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No. 86-130

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

VICKIE LORENE ROCK,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 25, 1986
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NOTATION

The opinion of the Supreme Court of Arkansas is reprinted in full in Appendix A to the petition at page i.

The judgment of the Circuit Court is reprinted in full in Appendix A to the petition at page xvi.

The pre-trial order of the Circuit Court is reprinted in full in Appendix A to the petition at page xvii.

The order of the Supreme Court of Arkansas denying rehearing is reprinted in full in Appendix A to the petition at page xviii.

RELEVANT DOCKET ENTRIES

CRIMINAL DOCKET

Date of Orders	Orders of Court
09-07-83	Order per precedent.
06-25-84	Defendant appeared with counsel and pleaded not guilty. Omnibus Hearing set for 07-09-84. Bond set at $2,500.00. Release 10% deposit.
07-09-84	Omnibus Hearing, order. Trial set for 10-01-84.
10-01-84	Order per precedent.
11-26-84	Pre-trial hearing on question of hypnosis of defendant for purpose of memory enhancement. Defendant will be permitted to testify, but evidence of matters recalled due to hypnosis will be excluded. Evidence of matter remembered and stated before hypnosis will be admissible.
12-04-84	Parties announced ready for trial. Jury empanelled and sworn. Opening statements by counsel. Court adjourned at 5:00 p.m. after admonishing jury.
12-06-84	Court convened at 9:00 a.m. Testimony on behalf of State begun. Upon being advised of a possible irregularity in the jury, the Court held hearing in chambers and found one juror impliedly biased. On motion of State and defendant Court declared mistrial and bound defendant over to new venure. Trial set for 02-06-85. Defendant continued on bond.
02-06-85	Parties announced ready for trial. Jury empanelled and sworn. Testimony on behalf of State begun. Court adjourned at 5:00 p.m. after admonishing jury.
02-07-85	Court convened at 9:00 a.m. Testimony on behalf of State resumed. Court adjourned at 5:00 p.m. after admonishing jury.

Date of Orders	Orders of Court
02-08-85	Court convened at 9:00 a.m. Testimony resumed on behalf of State. State rested. Motion tion for directed verdict overruled. Testimony on behalf of defendant begun. Court adjourned at 5:00 p.m. after admonishing jury.
02-11-85	Court convened at 9:00 a.m. Testimony resumed on behalf of defendant. Defendant rested. Rebuttal testimony received. Instructions by Court. Arguments of counsel. Jury retired to deliberate and returned into Court verdict of guilty of manslaughter. Sentencing set for 02-22-85. Defendant continued on present bond.
02-22-85	Defendant appeared with counsel for sentencing. Defendant sentenced to 10 years in Department of Corrections and $10,000.00 fine payable 60 days after release from the department. Defendant given right of allocation and advised by Court of right to appeal.
06-17-85	Order allowing extension of time.

Relevant excerpts from the transcripts of evidence adduced at the trial of this action in the Circuit Court of Benton County, Arkansas

EXCERPTS FROM THE TESTIMONY OF ALLEN STRICKLAND:

CROSS EXAMINATION

(p. 359) By Mr. Maglothin:

Q Officer Strickland, you were kind enough to provide me with your report and your notes and everything at the break and I appreciate it. Now, your testimony was that Vickie told you—now, in this interview, was that the same one that Officer Roles had with her?

A That's correct.

Q You-all conducted this interview together?

A That's correct.

Q And so he either took notes or he made a report and you made a report?

A Yes, sir.

Q All right. And she told you in this same interview with Officer Roles, "I then asked her to tell me what happened. She stated that, she said that she told her husband she was going to go outside." Now, I guess referring, outside the apartment?

A Yes, sir.

Q "She stated that she told her husband"—excuse me—"when he refused to let her leave and grabbed her by the throat and began choking her"; correct?

A Yes, sir. Sounds correct.

Q "She struggled for a moment and she grabbed the (p. 360) gun"? So the indication that you got was she tried to leave this living area; correct?

A That's correct.

Q And as she was trying to leave a struggle broke out, she got choked, and she grabbed the gun?

A (Witness nods affirmatively.)

Q Now then, you testified about this apartment being cluttered? It had a small living area?

A Uh-huh.

Q But, now—how many years do you have in law enforcement, officer?

A Nine years.

Q You would agree with me, for instance, this courtroom is kind of cluttered, but if I was going out that door you could really work me over right there by the door and not disturb anything in this courtroom if I'm, if you wanted to?

A I presume I could; yes, sir.

Q All right. And then when looking at the pictures, you testified earlier that, you know the picture by the door, there was a space there where somebody in essence could have been choked without knocking anything over?

A Correct.

Q Shoved without knocking anything over?

(p. 361) A In that particular space, after looking at the picture, I don't think so.

Q Well, let's look at that picture.

A There's not as much room there as I had recalled.

Q Well, wait a minute. Let me ask the questions. Let's look at this door right here. If I was going out this door, you could shove me up against that door and if there are whatnots all around here and I hit that door, it wouldn't knock anything over; would it, sir?

A No, sir.

Q If you look at State's Exhibit No. 11, there's nothing, not anything on the left side of the door right next to it; is there?

A There's a bookcase right here just outside the screen area, there's a space there.

Q But there's not anything right in the immediate area of the door; is there?

A Right.

Q All right. "She told him to leave her alone and he hit her, at which time the gun went off"? You recall her saying this; don't you?

A I recall her saying she shot him.

Q Well, now, wait a minute here. What did you put in your little report?

(p. 362) A This is a typed report, "Grabbed her by the throat and began choking her. They struggled for a moment and she grabbed a gun".

Q The gun, you'll have to speak a little louder.

A I'm trying to get down to where you were at there at the . . . . "she told him to leave her alone and he hit

her, at which time the gun went off", that's what the report says.

Q Just a second ago, you made the statement that she said she shot him; correct?

A That's right.

Q Now, but this is what she said, right, because that's what you put in your report?

A She said that she shot him.

Q Well, let's look at your notes right back of that that you took, you—did you take these notes contemporaneously?

A Just after the interview, after I—

Q In these notes, "she picked up the gun, victim hit her, subject then shot victim"; right?

A Yes.

Q So you got two different accounts which are, in your own mind, the same thing; correct?

A Yes, sir.

Q All right. Let me have your report back. "She (p. 363) stated that it was an accident and she didn't mean to shoot him"?

A That's correct.

Q And she told you that, correct, and you have got that in your report, your typewritten report?

A Yes, sir.

Q "She wanted to go to the hospital to make sure everything was all right"? She said that and you've gotten that in here and in your written report; correct?

A I believe I do.

* * *

(p. 375) REDIRECT EXAMINATION

By Mr. Clinger:

Q Allen, let's see, we have—I'll give you back your report; all right? I believe that when you testified to the Jury you testified definitely that you recall the Defendant saying that she had shot Frank Rock; is that the language she used?

A She said that he had hit her and that she shot (p. 376) him.

Q All right. Now, Mr. Maglothin has used two documents to refer to and I assume—well, let's first go to your field notes. Do you have those with you at this time?

A Yes, I do.

Q All right. You have got the live, original copy?

A Yes.

Q When did you do these? When did you write up this, these notes, this handwritten deal?

A At the crime scene when, while I was waiting on Lieutenant Jones to arrive.

Q How much time had gone by from the time that you had taken this statement from the Defendant? How

much time had elapsed before you sat down and wrote this out?

A I believe about a half hour.

Q Okay. Fairly fresh on your mind at that time; is that correct?

A Yes, it was.

Q Okay. In this, does this contain your statement you have testified to that she, he hit her and then she shot him?

A Yes.

Q And that's exactly what is here, that's the exact (p. 377) language there?

A Exact language.

Q You stated that you wanted to—just read in whatever you wrote.

A All right. "Ask subject what happened. Subject stated that she told husband she was going outside and he refused to let her. He grabbed her around the neck, she picked up the gun, victim hit subject, subject then shot victim. Stated it was an accident and she didn't mean to shoot him", is what it says.

Q Kind of late?

A "Wanted to go to the hospital to make sure everything was all right."

Q All right. Where were you when you wrote this out?

A I was in my car at the crime scene.

Q Waiting for Detective Jones to arrive?

A Yes, sir.

Q You wrote this out before you had processed the scene?

A I'd been into the scene, I had made this diagram at that time without the measurements, and went out and wrote this up.

Q All right. When Jones got there, is that when (p. 378) you went around and took pictures and gathered up evidence?

A Right.

Q You say when you wrote these notes out, what did you do with them?

A They were placed in the investigative file.

Q Okay. Then I believe that you later came up with a two-page typewritten report which included just about everything you did that evening; is that correct?

A Yes, sir.

Q Okay. In fact, you talked about the evidence you obtained at the scene?

A Yes, sir.

Q All that stuff; is that correct?

A Yes.

Q You even talked about the MDT?

A Yes, sir.

Q When you were specifically referring to the statement she gave you, to you—get out your notes and read them—how did you come up with this?

A I turned on the tape recorder and put a heading on it and verbally indicated on the tape recorder what had happened.

Q You tried to cover everything that had gone on (p. 379) from the time you were called in?

A From the time I was called in until all the evidence was turned in to Detective Armstrong.

Q All right. In this report, as has been pointed out correctly by the defense attorney, as you go through the choking business, "grabbed her by the throat and began choking her", I believe you already testified you didn't see any signs that she had been choked or struggle—"they struggled for a moment and she grabbed a gun, she told him to leave her alone and he hit her, at which time the gun went off". Obviously you've got a conflict in the statements. "The gun went off and she shot him, shot the victim. Subject then shot victim." Which one is it? Which one is an accurate statement?

A What she told me, said, "he hit me and I shot him"

* * *

EXCERPTS FROM THE TESTIMONY OF VICKIE L. ROCK

* * *

(p. 839) Q All right. Now then, I'd like to bring you up to July the 2nd, 1983. I want you to start when you and Frank got up that morning. Tell the Jury what happened that day?

A Frank went to work for the recycling on Saturday from eight to noon—

Mr. Clinger: Your Honor, if it please the Court, may we approach the Bench?

The Court: All right.

(Reporter's Note: The attorneys out of the hearing of the Jury at the Bench.)

Mr. Clinger: Your Honor, I think this is a flagrant violation of your order. It's my understanding that it limited her testifying to the events of the day (p. 840) leading up to Frank's death strictly to what she told Dr. Betty Back or these officers. This is brand new. I have never heard this before. She did not tell this to the officers or Betty Back.

Mr. Maglothin: Well now, I think this court order went specifically to how the gun went off.

The Court: No, no. It went to anything that was not included in the pre-hypnotic session.

Mr. Maglothin: As far as general background?

The Court: As far as the day of the crime.

Mr. Maglothin: As far as the day of the crime?

The Court: That's correct.

(Reporter's Note: Back within the hearing of the Jury.)

(p. 841) By Mr. Maglothin:

Q Vickie, on July the 2nd, 1983, did you and Frank have a discussion about moving out to the trailer?

A Yes, sir, we did.

Q Explain to the Jury about that discussion?

Mr. Clinger: Objection, Your Honor. May we approach the Bench?

The Court: Well, if it's the same thing, I have already ruled on it.

Mr. Maglothin: Judge, it's the first sentence in her notes, "Patient states she and husband were discussing moving out to a trailer she had previously owned". I think she can testify to that.

The Court: Sure.

Mr. Clinger: What I'm going to ask is if she goes on and says they were arguing and fighting or were quarrelling, these are specific excerpts from (p. 842) Dr. Betty Back.

Mr. Maglothin: That brings up another point I'd like to introduce of her testimony about some of these things that Dr. Betty Back—I thought the Court limited it to these two pages of notes.

Mr. Clinger: And her testimony, is my understanding.

The Court: Maybe the Court can clarify.

Mr. Clinger: We looked at the order and I think it says exactly what she said.

The Court: I don't understand what the dispute is right now.

Mr. Maglothin: The question is can I ask her things concerning, Betty Back testified to some things that Vickie told her that was pre-hypnotic that is not reflected in her notes. I thought the court order was confined, confined it to these two pages of notes.

(p. 843) The Court: No. My order was, I will have to refresh myself on it, but my order was that she be limited to testifying to matters which she recalls at the time of her pre-hypnotic session with the doctor. Now, whether it's in the statement or whether if's not in the statement doesn't make any difference to me. All I'm concerned about is that she not testify to anything from a post-hypnotic session.

Mr. Maglothin: I understand that and I think the specific line of questions about the discussion of the trailer referred to in the notes here—

Mr. Clinger: Your Honor, I have not—no objection to it being brought up. I'm talking about to expound on it. (p. 844) I'm sure he's covered it and she won't expound on anything more than is in the notes.

The Court: That's what she's limited to because that's all that was put down. It's the only way of knowing what she had discussed with the doctor.

Mr. Maglothin: Let me look at the Judge's order just briefly .... all right. Thank you.

By Mr. Maglothin:

Q Did you and Frank have a discussion about moving out to the trailer on July the 2nd?

A Yes, we did.

Q Okay. Was Frank somewhat upset about that?

A Yes. He wanted to do it right away.

Q Okay. Now what trailer are we talking about?

A It was the trailer that I owned before Frank and I were married.

Q All right. Now, did you and Frank go look at that piece of land and trailer that particular (p. 845) day?

A Yes, after—

Mr. Clinger: Objection, Your Honor. I have to ask to approach the Bench.

Mr. Maglothin: Judge, there's testimony in the record that they went out to look at the trailer.

Mr. Clinger: No, that's in his opening. We've got it here in my notes exactly what he said and here in her testimony it doesn't say one thing about them going anywhere.

Mr. Maglothin: That's the testimony in the record. They went out and looked at the trailer, from Bertha, they had gone out to the house and got the shocks and were going out to the trailer to look at it.

Mr. Clinger: I don't care what they did. (p. 846) We're going by the Court's order and asking it to be limited to, these are excerpts.

Mr. Maglothin: Well, Your Honor, I will withdraw the question and go on to something else.

The Court: All right, but for future reference, what does this mean down here?

Mr. Maglothin: She can testify about whenever they were discussing—

Mr. Clinger: No, she's limited and I'd ask for an *in camera* hearing on this, Judge.

Mr. Kelley: Well, we'll just introduce the notes. You're depriving her from testifying.

The Court: You-all are the ones that deprived her by submitting her to hypnosis. At this point, I don't know what the importance of whether she testifies to going out there or not, but the point (p. 847) is that you're going to limit yourself to what she recalled and told the doctor on the first session and I'm not going to allow anything further.

Mr. Maglothin: I understand that, Judge.

The Court: I don't appreciate the suggestion that I was preventing her from testifying to anything. I'm not.

Mr. Maglothin: Well. Judge, I'll make my record on it later on, but it was a point that was in there and I think I was entitled to ask her about it.

The Court: All right.

(Reporter's Note: Back within the hearing of the Jury.)

By Mr. Maglothin:

Q Vickie, without violating the Court's order (p. 848) about what you can testify to and what you cannot testify to, I want to bring you down to till approximately when Jeff and Frank were working on the van and that Jeff left—

Mr. Clinger: Object to that, Your Honor. She's not testified they were working on the van. In fact, she can't testify to that according to the order. I'm going to ask for an *in camera* hearing.

Mr. Maglothin: It's in the record. They were working on the van.

Mr. Clinger: I know what the other witnesses testified to. We're talking about what this witness is allowed to testify to. I'm going to object to leading and I'm going to ask for an *in camera* hearing so I can be sure that there is a good faith effort to comply with the Court's order.

(p. 849) The Court: Well, I don't understand why the order is so hard to understand.

Mr. Clinger: I don't either, Judge.

Mr. Maglothin: Judge, it's not.

The Court: The order is that she not be allowed to testify to things that she now remembers that she did not remember prior to being placed under hypnosis.

Mr. Maglothin: I understand that.

The Court: Now, that's the extent of the order.

Mr. Maglothin: I understand that.

The Court: And I'm going to enforce that order.

Mr. Maglothin: I understand that, Judge.

The Court: All right. Now, is what you're now asking her included within the parameters of the notes that were made and the testimony that was given at the prior hearing?

Mr. Maglothin: I have got to get her from (p. 850) one point to another. I don't know how else to do it except read Betty Back's notes to her.

The Court: Well, I don't care. It's your lawsuit and you can try, but I'm going to enforce my order.

Mr. Maglothin: I'm trying to get her from one point to another.

The Court: Well, the court order is she will not testify to matters she did not relate to the doctor in the first session, and the best evidence we have of that since it was, since she was placed under the hypnosis that there, that a verbatim transcription of what she said was not made, the best evidence we have is what the notes that Dr. Back took and the testimony that Dr. Back gave at a prior hearing (p. 851) and that's what we're going to be limited to.

Mr. Maglothin: I understand that, Your Honor.

Mr. Clinger: If it please the Court, we have taken, in anticipation of the problem that might develop over this, we do have each and every reference, we have the same from the notes and we have every reference made by the, Dr. Back in her testimony by page number and

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we would be more than glad to submit those in lieu of the testimony if they have some difficulty in following the Court's order.

The Court: Well, I can't tell them how to try their lawsuit. Let's proceed.

By Mr. Maglothin:

Q Now then, you recall going to see Dr. Betty (p. 852) Back?

A Yes, sir.

Q And what was the purpose of going to see Dr. Betty Back?

Mr. Clinger: Objection. That's strictly outside the parameters of what we're doing here. She's allowed to give certain testimony. The Court has defined what the testimony is. Whether she went to Dr. Betty Back at their own request is something outside the scope of this right now.

Mr. Maglothin: It's been brought out in front of the Jury and I think she's entitled to testify as to why she went to Dr. Back.

Mr. Clinger: I object, Your Honor.

The Court: Sustained. It's not in the issue of this case.

Mr. Maglothin: I'd like to make a proffer on it. If she was allowed (p. 853) to testify, the witness would testify that she went to Dr. Betty Back at the request of trial counsel in order to submit herself to hypnosis so that she could remember certain details about the inci-

dent on July the 2nd, 1983. If she in fact was hypnotized, then the result of her post-hypnotic session was that she was able to remember certain details about the death of Frank Rock which she did not previously remember before. Counsel submitted that the failure to allow the witness to testify is a violation of her constitutional rights to testify under the Arkansas State Constitution and the due process clause under the U.S. Constitution.

(p. 854) (Reporter's Note: The proffer by defense counsel was out of the hearing of the Jury.)

By Mr. Maglothin:

Q Okay. Vickie, there's been testimony in the record concerning. that you went into the beauty shop while Jeff had left the apartment, okay? Are you with me? You know where I'm at?

A No.

Q On July the 2nd, 1983, Jeff left your apartment, yourself and Frank's apartment?

A Yes.

Q Okay. You went into the beauty shop and laid down?

A Yes, I did.

Q All right. Now, without violating the Court's order about what you can testify to and you can't testify to, tell this Jury what happened then?

A I went in and laid down in my beauty shop and I heard Jeff drive up and I heard him come in and the

television was on and they were watching HBO and I heard another car drive up—

(p. 855) Mr. Clinger: Your Honor, I'm going to have to object. Number one, there's no mention of HBO tv, Jeff driving up, no mention of another car. I'm going to ask for an *in camera* hearing, Your Honor. I think it's a flagrant violation of the Court's order. It's putting us in a position of appearing to be restricting the witness from testifying when the matter that brought about the violation were done solely at the instance of the defense counsel. We resent it and I think it's creating a bad picture to the Jury.

The Court: Mr. Bailiff, take the Jury please.

(Reporter's Note: The Jury out of the courtroom.)

The Court: All right. Mr. Clinger?

(p. 856) Mr. Clinger: Your Honor, I would first ask the Court to inquire of these defense counsel whether they have taken steps to insure that the witness has been instructed to give testimony restricted only to the comments that were attributed to her by Dr. Betty Back. I'm entitled to that and I think the Court should be, too, because so far I can't find any indication that they have tried in any way to limit her or limit the testimony or prevent her from making these outbursts in an effort to confuse matters and disrupt this trial.

The Court: What about it?

Mr. Maglothin: Judge, the problem is getting from one point to another. You know if you just read the notes that are in the (p. 857) record, it states that she and her husband were discussing moving out to the trailer she

previously owned, he was set on moving out to the trailer, she felt they should discuss it, she became upset and went to another room to lay down, the brother came in and left, she came to eat some pizza, he wouldn't allow her to have any. The problem is getting from one point to the other point. You know, Betty Back's notes are taken, they're not even complete sentences, Judge. You know we have been limited to the matters that are in this discussion about the trailer, what she was doing when she come out, about the pizza, and—

(p. 858) The Court: Well, of course, the problem is raised by the fact that no transcript was made of that first interview with Dr. Back.

Mr. Maglothin: Except her notes.

The Court: Yes, so that's what I'm limited to. I realize that's got to be, there's got to be some reasonable latitude in setting the context, but to introduce—I take it from what I have heard here you're introducing things that she simply said at that time she did not remember?

Mr. Maglothin: No, Sir, no, Sir. The whole essence of Dr. Back's testimony at the last hearing and it was, the fact she couldn't remember what she did with the gun, couldn't remember how the gun went off, number one, and what she did with the gun, number (p. 859) two. The post-hypnotic suggestion brought that out through two sessions of hypnosis. Now she remembered all of this. She didn't, you know, she did not have a blank on this part of it. Two, the main points were the fact, how the gun went off and what she did with the gun.

The Court: That's your view of it. Now, the point is that the Court's order was intended to try to repair the

damage done by you people putting her into hypnosis without considering the effect on this trial, and I realize you did that in good faith but that's where we're at, so what I have got to do is try to figure out a way for this thing to go forward and let her testify but let her (p. 860) testify to things that she remembered at that time because anything after that was the result of a post-hypnotic suggestion which I will not permit.

Mr. Maglothin: Judge, I think I can make a proffer at this point and let her testify as to what happened up till the time of the shooting and then what happened, what she remembered. No one knows what she remembered after the post-hypnotic session which we haven't had testimony on. That's what's over in the last hearing with Dr. Back or in this trial.

The Court: Go ahead.

Mr. Clinger: Your Honor, first we'd like to point out that at the hearing we had on this hypnosis business after, and (p. 861) I'll also point out that we had never been provided with a transcript of what went on or a report or anything else from the, Dr. Betty Back. We had to get them that day only because we had subpoenaed them. I point out we had a hearing, first off, the State had a copy of two pages of notes she took and that was it. Although the Court was well aware of the case law going back to 1971, it says they ought to be recording these post pre-hypnotic sessions, interviews. She didn't. They chose to do it that way. We went to put Dr. Back on to ask questions, they put her on the stand, we cross examined her and gave her every opportunity in the world to expound on, (p. 862) elaborate on, drag out, flush out, what-

ever, anything that was said to her in that pre-hypnotic interview. I gave her every opportunity to expand, and then after that hearing we, at the State's expense, had a transcript made and gave them a copy so they would know exactly how far Dr. Betty Back went and also they have made no attempts, there have been no attempts made by the defense at that time to put the Defendant on the stand and try to rebut anything that Dr. Betty Back said or, well, which I really remembered that or this. It's my understanding that this Court ordered, after hearing that extremely damaging post-hypnotic suggestion that (p. 863) she be able to remember everything, that there would be no gaps whenever she looked into her testimony. The defense attorney, the Court elicited it, the cat was out of the bag, the danger was there, and that's my understanding of why you ordered she would be limited to being able to testify to those things that she told Dr. Betty Back as evidenced by Dr. Betty Back's notes and the Doctor giving testimony at the hearing. Now, they're going, trying to, and I still don't have an answer, I don't believe the Court has an answer, to whether these defense attorneys have instructed or worked with this witness to make sure she, you know, (p. 864) she's bound by the notes or the testimony, which we don't have an answer to, and I think they need to, an answer to before we can go back in and bring the Jury in, instead of me bouncing up and down like a yo-yo.

Mr. Maglothin: Judge, on Page Eleven, Lines Twenty-three to Twenty-five, she tells the Court what the problem was, she couldn't recant, remember how the gun went off or what she did with the gun. Now, these general matters about what they were doing that day, she remembers that.

The Court: Who says so?

Mr. Maglothin: Well, the witnesses have testified—

The Court: Dr. Back didn't say so.

Mr. Maglothin: She says right here she (p. 865) couldn't recant, remember how the gun went—

Mr. Clinger: That's Dr. Betty Back saying what Mr. Putman told her, not anything this witness told her. That's her charge from the defense attorneys. I also point out, Your Honor, to counsel that Dr. Betty Back had no problem getting from one point in there to, back to another in the history, moving around from one place to another in the service, her previous marriage, what had gone on in that marriage, how many times she had been struck or beaten or slapped by her first husband. They had no problem going through the notes, but there is a problem that they have created, and we're (p. 866) going to insist that the Court's order be enforced. I'm sorry that it isn't working out so she can speak more about this evening. I believe the Court's order is black and white.

The Court: Well, I think it is, too, and my intent in the order is very clear. All counsel knew what my intent was at the time, there wasn't any question about the wording of the order, and so I'm going to stick with it. Now, Mr. Maglothin, if you need some time to talk to your client and explain to her what the limits are, I'll give it to you, but we're not going to have this same sort of thing going on that we just had.

Mr. Maglothin: I understand, Your Honor, (p. 867) and I will stick to it, but I want to make a brief proffer while the Jury is out.

The Court: Go ahead.

By Mr. Maglothin:

Q Now Vickie, go ahead and for the record, the Court has ruled, of course, that you are limited to Dr., what you told Dr. Betty Back in the pre-hypnotic session. Do you know what I'm saying?

A Yeah.

Q All right. You go ahead and tell the record, for the record, what happened that day.

Mr. Clinger: Objection to this. He wants to make a proffer into the record.

The Court: Your objection is out of order. Let him go ahead.

By Mr. Maglothin:

Q Go ahead.

A You want me to—

(p. 868) Q Speak up.

A Start from when we went out to the trailer?

Q Yes, ma'am. Go ahead.

A Well, we, went out to the trailer and looked at it and we talked about the different things that had to be done to the trailer before we could move out there and then we went to his mother's house because she had called and said the shocks were at her house, so we went to her house and Frank got the shocks from her and told me to write her a check for the shocks, so I wrote her a check, and Frank, Frank's daddy told Frank that—

Q Okay. You don't have to go into hearsay. What happened after you went and got the shocks and stuff?

A Well, we were there for not very long, I guess it was about thirty minutes or so.

Q Where did you go after that?

A We went back to the apartment.

Q Okay. What happened then?

A And Frank and I, we, we got there, I told him I would change my clothes and go help him put the shocks on.

(p. 869) Q Okay.

A And I started to change my clothes and he started in about his brother who showed up and so I told him that he knew his brother wasn't going to show up because he never did unless he needed money or something and I got my clothes changed and started out and Jeff showed up and so Jeff went out to help Frank change the shocks and they came in a couple of times to get beer and go back out or whatever they were doing and I was doing the laundry at the time and so I fixed myself a drink and then Frank and Jeff came in when they got through changing the shocks and they locked the shop up and everything and they set down and had a couple more beers and I was watching television and Jeff left about, oh, I don't know, maybe six o'clock.

Q Speak up just a little bit so Ken can get everything.

A And then he, we, he left, Frank told me he was coming back for pizza and Saturday was usually Frank's night to cook so I just figured we were going to have Frank's pizza but he told me they were going to order and

that Jeff was (p. 870) going to pay for half of it so I told him that he knew that Jeff wasn't going to pay because Jeff was broke, that's the only time Jeff ever came over was when he was broke, so Jeff showed back up but before he showed up Frank and I had discussed about how my little brother was and—

Mr. Clinger: I guess I have got to reserve my right to hearsay.

The Court: No, it's just a proffer.

By Mr. Maglothin:

Q Go ahead, Vickie.

A And when I heard Jeff's car show up I just went into another room because I didn't want to see Jeff.

Q Is that the room in the beauty shop area?

A Yes, that was in the beauty shop.

Q How long were you in that room?

A About two hours.

Q Okay. When you came out of that room, was Jeff present?

A No, Jeff had already gone.

Q Any time that you were in that room while Jeff (p. 871) was in the other room with your husband, did Jeff ever come into the room and say anything to you or did Frank ever come into the room?

A No.

Q Now then, tell the Jury or the Court and the record what happened when you came out of the room? Approximately what time was it?

A It was about nine.

Q All right. What happened then?

A Well, opened the door and I walked through and I asked Frank if I could have some pizza.

Q Okay.

A And he walked over to the bar and he slammed the lid down on the pizza.

Q Okay.

A And he said no, you can't have any, and he moved it around over onto the sink and so I told him that was fine and I'd go out and get something else to eat, down to the Susy Q.

Q Is that a restaurant or dairy bar?

A A drive-in like Dairy Queen.

Q What happened then?

A Then I went to the bathroom and put my shoes on.

(p. 872) Q Okay.

A And I came back out and started to walk toward the door and Frank come up and put his hand here on my throat and threw me back.

Q Let the record reflect that the witness grabbed her throat. Okay. Go ahead.

A And threw me back to the bar.

Q Okay.

A And so I started out the door again and Frank come around behind me and hit me on the back and pushed me over to the wall.

Q Okay.

A And I looked down and saw the gun.

Q Okay. Where was the gun sitting?

A It was on the end table.

Q Are you talking about the .22 revolver?

A Yes.

Q All right. What happened then?

A Well, I picked the gun up and turned around and I sat down on the coffee table.

Q Okay.

A And I pointed the gun at the floor and told Frank, I said don't hit me no more and I got up to walk out the door and he was standing behind me and I reached over and took the (p. 873) door knob and started opening the door to leave and then Frank come from behind me and run over and grabbed my wrist and said I wasn't going anywhere and the gun went off.

Q Okay.

A And I saw him fall and I backed up to the bar and dropped the gun on the bar and I ran to the telephone to call someone, get someone to help him, and I dialed the operator and asked her to get an ambulance to, to 801 North Second and—

Q Settle down now, settle down now, just take your time.

A The police came and—

Q Okay. Wait just a minute. Settle down now, settle down.

Mr. Maglothin: Judge, is she going to be able to testify as to what happened after the police came or—of course, it's not in Betty Back's notes. It's obvious that she knows what happened after the police came.

(p. 874) The Court: Well, what do the notes say about that?

Mr. Maglothin: They don't say anything about it. I don't think Betty Back went—she wasn't concerned really with what happened after the police came, so there's not any reference to that. In other words, I want her to testify as to how she felt, what happened to her after the police came, the fact that she told numerous police officers it was an accident, what they did with her, what she did with the police.

Mr. Clinger: Your Honor, I don't know how this can be done. The post-hypnotic suggestion that was given in that she wouldn't have any gaps in her mind. From then on out, she remembers every little (p. 875) detail. I don't know when the effect of the improper post-hypnotic suggestion ends. It's my understanding under the case law once it's been shown that she was improperly placed under hypnosis and improperly given post-hypnotic suggestions such as the kind that was given in this case, that's it.

The Court: Well, the problem is, Mr. Clinger, that all of the case law you have got and you have seen were cases in which the prosecution put somebody under hypnosis for investigative purposes and then a post-hypnotic suggestion was given and the result of which was testified adversely to the person—well, that's an entirely different situation than (p. 876) what we have got here and I'm dealing with an area, well, there's no law in Arkansas on it and very little in the United States in any instance

where the Defendant has been placed under hypnosis, and although there's some difference between the two the fact remains that it's just as, it's just as wrong for the Defendant to testify to things she didn't remember voluntarily as it is for any other witness and that's why I ruled the way I did. Now, I don't know, as a practical matter, I have no way of knowing other than by Dr. Back's testimony and her notes as to what this witness remembered after the fact. My memory of what Dr. Back testified (p. 877) was that at the first instance Ms. Rock didn't remember hardly anything, that was a matter of—well, she had suggested it was a matter of sort of retrograde amnesia which very often happens, so I don't see how she can testify to things that she supposedly remembers after the fact if in fact she did not remember those at the first session, that's the thing that's got me buffaloed.

Mr. Clinger: If it please the Court, I understand that most of the case law has to do with prosecutors or the State doing this sort of thing, but I just need to point out that the defense attorneys were well aware of all the pitfalls that came down in (p. 878) those cases. In fact, there was testimony at the hearing that they were fully aware of those things and just chose to ignore those guidelines—

The Court: Well, that may well be, Mr. Clinger, but that doesn't have anything to do with the efforts of the Court that the truth be brought out, and that's what I'm going to see to if I can possibly do it. Now, we have got the problem because of their having done this and I have just got to find the best way through the maze.

Mr. Clinger: Your Honor, when I remarked about their violating the guidelines, the reason I'm bringing that

up is because as I understand the current thinking as brought out by, in (p. 879) fact, I believe admitted to by Dr. Betty Back, certainly by the authorities she recognized, the big problem is, here is that improper use of hypnosis prohibits the other side from being able to carry on an effective cross examination and I think that's what this whole thing is.

The Court: Well, that's the biggest worry I have had all the way through and I said so when I made my order. Let me see those notes again of the first interview.

Mr. Clinger: Here are her notes. These are excerpts, Your Honor, and here's the testimony. Your Honor, there are two second pages on what you are reading on because the bottom line was cut off.

Mr. Maglothin: I don't have any problem (p. 880) with that one.

(Reporter's Note: After the Court read the documentation.)

The Court: Now, Mr. Clinger, what is it that you say of this testimony so far that is not fairly included in the notes of Dr. Back?

Mr. Clinger: A whole bunch, Your Honor. Going out to the trailer, that's not included in any of those notes, looking at it, that's not in it, going to the mother, that's not in it, getting the shocks, writing the check, going by the house for thirty minutes or so, going to help with the shocks, all of this stuff about Christmas, of the brother, all of that. The only thing in the notes about the brother is that the brother (p. 881) came and went after she had gone off pouting because they were fighting over the husband's desire to move

out to Avoca. There's absolutely nothing whatsoever said anywhere in those notes or Dr. Betty Back's testimony that there was ever any quarrel or fighting or argument or hard feelings or discussions at all about either of their brothers, that's complete fabrication as far as these notes are concerned, none, and this business about his brother being a deadbeat, that never showed up, and she just got through testifying to that, none of that is in here. The boys coming in and out for a couple of drinks and her fixing her a drink, I believe she says that in the notes, not of drinking but (p. 882) she wasn't intoxicated. She doesn't limit either one of them, Jeff or her husband, to a couple of beers, that's not, there's nothing in there like that, it just says here "husband was drinking that night", I believe, and it also says the brother came and went. It doesn't say anything, let's see, I understand from the note, it doesn't say anything about who was going to get the pizza or how it got there, it just simply says she said the brother left and came back and that they ate pizza, ate some pizza and her husband wouldn't allow her any. She doesn't say anything in those notes about Saturday being Frank's day to cook or anything about arguing (p. 883) about Frank, about whether the brother was going to pay for half the pizza. She says they had a fight about the little brother, that's not in here. She didn't want to see Jeff, that's not in here. They wasn't in the room for two hours, that's not in there, that Frank never came into the room, that's not in here either, either one of their testimony or in the notes. It says about him choking, she doesn't put any time reference in there, it has, says came out and said she wanted to eat some pizza, wouldn't let her go out and get something to eat, it doesn't say anything in here about the Susy Q or anything, that the husband wouldn't let her leave, that (p. 884) the husband

smashed her up against the wall and end table with the gun on it, she, that they were night watchmen for the business, picked up the gun and she said she didn't want him hitting her again or any more, there's no mention about all this business. Now she's filled it in saying that she went to the bathroom, none of this business about he first pushed her into the bar, none of that, nothing about chasing her down from behind and striking her in the face. Not only is it not in the notes, but in the testimony, I asked Dr. Back time and time again whether she had any idea how the gun went off or how he hit her or if there was any testimony about him (p. 885) pushing her or throwing her against anything in any way and Dr. Back said no, no, no, if she had said that she would have written it down, and let's see, shoving the pizza over from the table top to the sink, that's not in there, and then she now is testifying to slamming the lid down on the pizza, that's not in there, sitting on the coffee table, that's not in there, pointing the gun at the floor—let's see, she didn't say it to Dr. Betty Back. Denny Roles said she told him that she pointed the gun at the floor getting up to walk out the door. All it says is, she says is she picked up the gun and stated she didn't want him hitting her any more, he wouldn't let her out the door, slammed her up against the (p. 886) wall and he fell and died, none of that about pushing her against the door, hitting her, none of all of those details that have been filled in, Your Honor, and they were very important details, extremely important details. She says today I saw him fall and backed up to the bar and dropped the gun at the bar or on the floor, that's one of the critical points of this lawsuit and she has now filled in that and it's not mentioned one time anywhere in either the notes to Dr. Back or in the testimony of Dr. Back. We gave her an opportunity to flush it out in any way she

could and which she said she wrote down everything that the Defendant told her, (p. 887) I think, in fact, Your Honor, I concede, I would submit that ninety-nine percent of everything she testified to in the proffer is not covered in those notes or in the testimony from the hearing.

The Court: Well, I think that's probably a fair characterization because there's very little in these notes that, of details—

Mr. Clinger: I'd also point out, Your Honor, there's nothing in here that she ever, in fact that they were fighting and her husband used violence against her and picked up a gun, and one of the two police officers say they, she said she shot—three police officers say she said I then shot him. All those, she argues or there's argument (p. 888) to it that she can make because of the typewritten notes that one of the, one of the ones, one of the officers, that the gun went off. Other than that, there's no mention of pizza in any of the police reports, not one.

The Court: Well, I'm not concerned about all that, that's argument to the Jury. What I'm concerned about is what the parameters are of this, of her allowable testimony. As I see it, the only record that I have available ends at the time the gun went off and he fell and he died. As far as the Court is concerned, the ruling will be that matters that happened after that are outside of the realm of the Court's order, so that's where it will be cut off.

(p. 889) Mr. Maglothin: Judge, what about the general description up to the point he died? You know, if I am limited to just the exact words that are in Dr. Back's report, I might as well just read the report to the Jury.

Mr. Clinger: That's fine with me, Your Honor. Read the notes or read her testimony.

The Court: Well, we're not going to do that.

Mr. Clinger: Your Honor, they're at a hard spot but they put themselves there, and t allow the attorneys to go on with this confabulation that her own expert witness says is a true and obvious and real continuing danger—

The Court: Yes, I understand that. Well, I don't know how else I can say it. I have said it more times than I really think was necessary right (p. 890) now, but her testimony is going to be limited to the events and the things that are in these notes, and as far as embroidering upon them, I'm not going to allow very much of that but I also realize that she's got to be allowed to tell it in her own way as to what I think from the evidence is indicated that she remembered at the time and not what she remembers because of a post-hypnotic suggestion. Now, I think most of what you're arguing about is a tempest in a teapot. Again, I'm not trying the lawsuit, you people are, and I'm going to rule on it the way I think it ought to be but I'm going to try not to inhibit either one of you any more than I have to. I'm going to give her (p. 891) some reasonable latitude as far as describing what went on up to the time, in other words, up to the point of what they, where they were arguing and so forth and the events that happened, she describes in here to Dr. Back, what happened as she remembered it at that point up to the point of the incident itself. I don't see any problem with that. I don't think that she ought to be permitted to testify to characterizations of other people because it isn't included in here, so what I'm saying is that all this business about the no-good brother is out because it hasn't got anything to do with this and it

doesn't have anything to do with what she told Dr. Back, (p. 892) As far as going out to the trailer and so forth, I fail to see what the importance of that is either way. As to what she said, I don't see a big problem about that because Sergeant Roles has already testified to it.

Mr. Clinger: Your Honor, the Jury may not believe Sergeant Roles. They have got the Defendant up here testifying and now I'm afraid it's beginning to fill in some details. I'd like to make specific inquiry of the Court, as the Court can see from the notes—

The Court: Well, you can make inquiry of any witness on the stand, but you're not going to make inquiry of the Court.

Mr. Clinger: I'm just asking for a clarification on your ruling.

(p 893) The Court: Well, it's been pretty clear, I think.

Mr. Clinger: When you say you will allow her to describe the events leading up to the shooting, am I, can I take it then she's not being allowed to, she will not be allowed to describe where she was pushed, where his hands struck her, what wall she hit, or any of that business? The reason I bring it up, Your Honor, Dr. Back was specifically asked by me several times during the testimony if any of that was ever done and, it, and she said it was not. I even asked her if she ever handled it and she said she did not, so now to allow her to describe the fight scene over at the bar and one of the doors and the wall, it is (p. 894) all, I don't know the scope of that.

The Court: Uh-huh. Well, I think that's essential to the issue and I think that you certainly can cross

examine her on all that. I realize the problems, problems. That's why I made the ruling I did, but the notes, the notes of Dr. Back include characterizations of what happened when the, when she picked the gun up. Well, I'll give you fifteen minutes, Mr. Maglothin, to talk to your client and make certain that we don't get back into the sort of things we did before. I realize there may still be some problem, but I'm going to enforce my ruling.

Mr. Maglothin: Your Honor, I can go ahead, with the Court's permission, (p. 895) and make my proffer into the record on the remainder of the proffer. I can do it faster than the witness would.

The Court: All right. Well . . . .

Mr. Maglothin: If allowed to testify, the witness would also testify that Frank Rock, when he walked back in there, he shoved her up against the wall, he choked her, she had never seen him act like this at all. It was completely out of character with his behavior, that she, the way she picked the gun up is that she had her right thumb on the back of the hammer of the firearm and did not have her finger on the trigger. She had her finger, it would be the pointing finger, right pointing finger, on the side of the (p. 896) trigger of the firearm, that when he jumped in front of her at the door that he grabbed her hand and grabbed her arm with either one or both of his hands and the firearm went off. She would further testify that she has not had any experience with firearms, that she knows the difference between a single action and double action firearm that she was trying to be careful in that she knew that the firearm would not go off unless it was cocked. She would further testify she was fearful

of Frank Rock and merely trying to leave the apartment to get away from him. After Mr. Rock had been shot, the police arrived, that she told all the police officers that it was an accident, that she (p. 897) also tried to call Mr. and Ms. Rock, that the police took her to the police station, that she cooperated with them fully in giving them statements and told them that it was an accident the entire time. In cooperating with the police, she allowed them to take pictures of her, that she never told the police that she had any marks on her, and when requested to take nude photographs of her, she cooperated to that extent and allowed the police to take nude photographs of her. Again . . . . is there anything else?

Ms. White: No.

Mr. Maglothin: We would like to also proffer, and I assume it would be part of the record, Your Honor, (p. 898) the testimony of Betty Back from the last hearing and also the notes of Betty Back.

The Court: Yes, it will be included in the record.

Mr. Maglothin: And if you would allow me fifteen, Your Honor?

The Court: All right. We'll be in recess fifteen minutes.

(Reporter's Note: After a recess.)

The Court: Go ahead and do what you were doing.

Mr. Maglothin: If the witness was further allowed to testify, she would testify that the only thing that was refreshed by the hypnosis—in other words, anything that she's remembered after the hypnosis and post-hypnotic

suggestion was what she did with the gun after Frank Rock was shot.

DEFENDANT'S EXHIBIT 8

(p. 899) PROCESS NOTES

Name Rock, Vicki
Patient 3041

9/27/84 34 yr old w-9—referred by Bill Putman.

PP: Pt charged [with] manslaughter of husband July 2, 1983

Hx PP: Pt states she & husb. were discussing moving out to a trailer she had prev. owned. He was "set on" moving out to the trailer—she felt they should discuss. She bec[ame] upset & went to another room to lay down. Bro. came & left. She came out to eat some of the pizza, he wouldn't allow her to have any. She said she would go out and get [something] to eat he wouldn't allow her—He pushed her against a wall an end table in the corner [with] a gun on it. They were the night watchmen for business that sets behind them. She picked gun up stated she didn't want him hitting her anymore. He wouldn't let her out door, slammed door & "gun went off & he fell & he died" [pt looked misty eyed here—near tears]

Personal Hx: Born in OK raised "all over" F was a traveling salesman. In Tulcaage 2-12. All over Miss under age 15. Moved to Ark & lived [with] [grandparent] for awhile. Moved to Mo. shortly—Then to Rogers, Lowell

& Rogers. 9 schs from 6th grade under grad H.S. in Rogers, H.S. Grades "not good, but not bad" 82nd in class of 187. After H.S. went to Ruths Beauty College, then worked Emmerson Elect., then joined Navy for a yr. Married 1st hus age 21 for 7 yrs. No children. Married deceased husband

* * *

EXCERPTS FROM DEFENDANT'S PROFFERED EXHIBIT NO. 9

* * *

(p. 907) Q Are you familiar in your readings of any of the publications put out by any of those folks, including Dr. Martin Orne, of any of the, their (p. 908) concerns about how, on the question of realiability of hypnosis?

A Yes.

Q And what some of the safeguards they have proposed to be followed?

A Yes.

Q Before hypnosis is used either with witnesses or suspects?

A Yes. I'm familiar with those.

Q Okay. When you undertook to hypnotize the Defendant in this particular case, were you aware of the suggestive guidelines by such people as Martin Orne?

A Yes.

Q Did you attempt to follow those?

A Yes.

Q Would you tell the Court what those suggested guidelines are?

A The first one is that the person by either a clinical psychologist or a psychiatrist trained in the use of hypnosis. The second one is that the person who is to do the hypnosis not to get facts from any of the law enforcement, legal, or other persons involved. Three, that the person, the person who's going to (p. 909) do the hypnotism to get a detailed report from the person to be hypnotized to determine what their memory, present memory was, it's situation is. Four, that the person who is to hypnotize the subject not be employed by or under obligation to anyone involved in the investigation, that the hypnotic session itself be recorded either by video or audio recording, and that no one be present at the time of the hypnotic session other than the subject and the clinician. Is that six?

Q I think so. After one of the, fifth one, I believe you said it was the session be either videotaped or recorded otherwise?

A Yes.

Q And what was the sixth one?

A That no one be present other than the clinician and the subject.

Q When you, when you talked with Mr. Putman over the telephone?

A Yes.

Q And he made you, he made his request?

A Yes.

Q I believe he told you he was wanting, he thought this session was necessary in order (p. 910) to enhance or, the memory of his client?

A Something similar to that.

Q Well, okay. I don't want to put words in your mouth. What was it?

A I don't remember the words verbatim, so I'm not sure if he used the words "enhance memory" or—

Mr. Putman: Your Honor, I believe she testified she has notes which are made more or less contemporaneous with our conversation. Perhaps that would refresh her memory as to what was said in that respect.

By Dr. Back:

A All the said to me is he wanted the details of the night that her husband was shot.

Q I was also going to ask you, are you a member of the American Psychological Association?

A Yes.

(p. 911) Q Are you familiar with their journal, "The Monitor"?

A Yes.

Q All right. Do you subscribe to it?

A Everyone who's a member of the American Psychological Association gets that one free.

Q Okay, okay. Have you had a chance to refresh your memory from your notes from your conversation with Mr. Putman?

A As I said, what he said to me was that he wanted the details of the night that her husband was shot.

Q All right. Did he explain why he thought it was necessary that she undergo hypnosis?

A I don't believe that he said that it was necessary that she undergo hypnosis. I believe he asked me if I would be willing to hypnotize her to see if I could help her remember the details of the night.

Q Okay. Did he indicate—he indicated then she was having some recall problems or some trouble with her memory about the exact details?

A Right. That she couldn't recant, remember how the gun went off or what she did with the gun.

(p. 912) Q Okay. In your discussions with Mr. Putman, did you talk about the dangers of, or the pitfalls or problems that could possibly arise from the use of hypnosis from somebody such as a suspect in that case?

A Yes.

Q Did you talk about the, setting up any, making sure you followed particular procedures?

A Yes. I told him that there was a lot of controversy in regard to this and that I didn't want him to tell me any more details, to stop right there, that was one of the guidelines, and I did mention to him there was controversy in the area and he said he was aware, he, and I said with that, if you're aware of that, yes, I'm willing to hypnotize the subject.

Q Okay. I believe you said you saw the Defendant the next day?

A That's correct.

Q And she came to your office by herself?

A No, Mr. Putman brought her to the office.

Q Did you have a conversation with Mr. Putman and with the Defendant together?

A No, not at any time.

(p. 913) Q All right. He simply said here she is?

A He came to my office briefly, said hello, how are you, and he said that's Vickie Rock out in the waiting room. I said is she comfortable about this, does she have any apprehensive feelings about it, and he said not that I know of and I said okay, I don't want to know anything about it and just let me work with her and he said fine. We went back out and I got Ms. Rock and he left the office.

Q Okay. When you began your interview with Ms. Rock, did you make any attempt to record your initial interview with her?

A I wrote down the notes of our conservation, which you have read.

Q I know. Did you record it in any way with a tape machine or videotape?

A No. I only record the hypnotic session itself.

Q Can you tell us why you didn't record your initial interview with her?

A Oh, it's just not customarily done. We don't usually record interviews. We just don't usually do it.

Q When you were talking with Mr. Putman the day (p. 914) before, did you-all discuss how vitally important

it is in light of the trend in the cases involving hypnosis that all reasonable steps be taken to record everything that the patient has to say before she enters into the hypnotic session, hypnosis session?

A Would you repeat that, please?

Q When you were talking about it with Mr. Putman the day before, did you discuss how important it is to keep an exact record of exactly what the witness or subject's or suspect, the patient has to say, what they can recall prior to the hypnosis session?

A I don't believe that I discussed that with Mr. Putman. I know I was going to take notes.

Q Okay. So he didn't say anything to you about the need to make sure that verbatim records were kept of everything she had to say prior to entering into the hypnosis session?

A No. Mr. Putman usually doesn't tell me how to do my work.

Q Okay.

A I think he knew that I would take verbatim notes of what she said.

Q How long did your interview with her last?

(p. 915) A Oh, I'd say about an hour.

Q You have shown us here what's been introduced into evidence, Defendant's 1, a one single sheet of paper that has handwriting on front and back?

A Yes.

Q Is that every word she said to you within the hour?

A I obviously cannot write down every word that someone says.

Q Right. That's obvious. I'm asking you does that paper include everything that she said to you during the hour?

A It's not every word verbatim that she said. It has quotes in there, pertinent parts were I tried to, try to write down verbatim the words she said.

Q Pertinent parts? You determine what were pertinent?

A Well, I think it's more pertinent when she talks about what happened the night her husband was killed, for example, than when I was taking a family history.

Q All right. And then I believe that after talking to her for an hour you then hypnotized (p. 916) her; is that correct?

A That's correct.

Q During the period that you were talking with her, did you satisfy yourself that she was willing to go through this hypnosis?

A Yes.

Q Did she understand the purpose of it?

A Yes.

Q Did she understand the purpose was to what? Try to enhance her memory of the details of the night her husband was killed?

A That's correct.

Q Was she, was she—did she state to you that she had problems remembering all the details of it?

A I don't remember if she said she had problems. She just, I told her to tell me what she could remember and she told me what she could and she said that's all I can remember.

Q Okay. Did she, so she was totally aware that she was being hypnotized for the purpose of refreshing or enhancing her memory for the purpose of trial preparation; is that correct?

A Yes.

Q To assist her attorney?

(p. 917) A Yes.

Q Would you say that she was aware that she was there in order to help in that trial preparations?

A Was she aware she was there to help?

Q That her participation in the hypnotic session or hypnosis session was being conducted with her cooperation in an effort to help her attorney prepare her case?

A Yes, I think she knew that.

Q All right. Would you, would it be safe to say she was there trying to help herself?

A I think so.

Q Okay. And in other words, she was aware that it might probably be, she could remember things under hypnosis that might aid in her defense in the case?

A At this point, I feel like you're making me guess farther and farther. We didn't discuss that. You're just

sort of taking me farther and farther away from the facts of what we talked about and I don't want to guess what she thought at that point. I don't know.

Q Well, you stated you, a few minutes ago you were one hundred percent or in your belief (p. 918) that she was under the influence of hypnosis during the session, that she was a good subject?

A That's my opinion. She was a good subject and I felt she was hypnotized.

Q Does that require you somewhat to look into her mind a little bit?

A I didn't look into her mind; no. I observed her behavior and that's how I determined that she was a good hypnotic subject.

Q Okay. And that's how you determined whether she was being honest with you?

A I didn't say that I determined whether she was being honest with me.

Q Do you know whether she was being honest with you?

A No, I don't.

Q In fact, isn't it a fact that the leading experts in this area are of virtually unanimous opinion that people who even under the influence of hypnosis are capable of manufacturing statements or leaving out, even out and out fabricating?

A Yes, that's true. You have to keep in mind this happens with subjects that are not (p. 919) hypnotized, also.

Q Obviously.

A So there's really no difference in that regard.

Q I can see that, in other words, there's no truth guarantee with hypnosis?

A Certainly, not at all, no truth guarantee.

Q Now, I believe you said that—well, let me back up a little bit. Would you agree with the idea or with this statement that the validity of the hypnosis session depends a great deal upon the relationship that is established between the hypnotist and the patient?

A Yes. I think there has to be a certain amount of trust, I think the patient has to trust the hypnotist to allow this to happen.

Q All right. Lots of times in these sessions or, I'm not talking about just the Defendant in this case, but doesn't the patient, if that, if that trust is developed, doesn't the patient sometimes have a strong desire to please the hypnotist?

A That's true. That's why you have to be very careful that you don't lead the subject in any way or suggest anything to their memory.

(p. 920) Q Right.

A Because the person is very suggestible during that time.

Q Right. Isn't that one of the definitions of hypnosis is the state of heightened suggestibility?

A Yes, it is.

Q When a person is extremely subject to suggestions made by the hypnotist?

A That's why it's very important that the, who's doing it be careful not to introduce information or to lead the person into things that they might fantasize and later think to be memory that are not. On the other hand, a person who's being questioned directly, very directly under a state of high emotional state, say, for example, a person such as Ms. Rock were being questioned by the police department under a lot of pressure and a lot of detail, that could also confuse her memory much more so than a hypnotic session could.

Q Could you agree with the idea that some times a hypnotist prior to the actual hynotic session itself can, by words or actions, make suggestions to the patient.

(p. 921) A That's correct.

Q Even unconsciously?

A That's correct.

Q And I guess once again you would say that that's why the expert has to be very careful to make sure they don't do that sort of thing?

A Yes.

Q Wouldn't it be desirable in order to prove to this Court, let's say today, that you didn't do any of that business during your pre-hypnotic session, that you didn't unconsciously make suggestion to her or lead her or do things that might create in her a feeling that you had certain expectations that you wanted her to meet and you would be disappointed that she doesn't, wouldn't it have

been of value to have a, let's say a tape recording of that entire session?

A It may have been. We don't have recordings of that.

Q Right. Wouldn't it have been, wouldn't it have been nice if we did have something like that?

A That would be nice.

Q All right. Do you know of any experts in the (p. 922) field who suggest strongly that, that in cases exactly like this that the pre-hypnosis session be recorded and preserved just like the hypnotic session itself?

A Well, let me say this. Maybe you and I are confusing terms a little bit. What I would call a pre-hypnotic session and history gathering interview, I see a, two different things. My understanding of the pre-hypnotic session is just talking to the patient, getting a, them relaxed right before you hypnotize them. I don't know if I would call the pre-hypnotic session itself just a history gathering.

Q Do you know of any experts in the field who advocate that in situations where a person is going to undergo memory enhancing hypnosis that that, an expert who advocates that every single bit of contact between the hypnotist and the patient be preserved by videotape or recording?

A I'm sure there are people who advocate that. What I have tried to go by are the standards in the Hurd case, of the six standards that regularly are felt to be sufficient in most states. Most clinicians can't afford video (p. 923) equipment, the kind of things that, you

know, where you can record everything that happens from the moment that a person walks in your door, and I wouldn't think it's typically done. I think typically the safeguards that I used are considered to be sufficient.

Q Did you discuss with Mr. Putman the necessity for videotaping any part of the hypnotic session?

A No. I told him I would use audiotape.

Q And he didn't suggest to you that videotape would be preferable?

A No.

Q Okay. I believe that—now, when did you turn the recorder on? What was going on when you turned the recorder on?

A We were, we moved to another room. I have a room that has a couch in it that's more comfortable. It's a smaller room. I can adjust the right lighting in it. I turned it on. We went in that room. It was on from the time I settled her down on the couch and got her comfortable and from the time we went in the room.

Q So the tape has the entire hypnotic session (p. 924) on it.

A Yes.

Q Including placing her under hypnosis?

A Uh-huh.

Q And I believe you said that during the, in your opinion although people can fake hypnosis, which they can; is that correct?

A Yes.

Q In fact, aren't there some leading experts who say that even the best hypnotists can be fooled?

A That's true.

Q When you say that you're a hundred percent sure that she was not faking—

A I don't know that I ever used the word "a hundred percent". I think I said—

Q Maybe it was absolutely.

A Yeah. I feel certain, you know, that she was hypnotized.

Q But in light of, but you recognize you could be wrong?

A Yes, sir.

Q And she could have faking it?

A Yes.

Q Okay. And then I believe that you hypnotized (p. 925) her and then you interviewed her?

A I what now?

Q Interviewed her or—

A Well, I hypnotized her and then I used a regression technique where I took her back through some older memories to see if she were able to do that kind of thing and then moved forward up to the night or the time of the shooting of her husband.

Q Okay. How far back did you take her?

A I believe I took her back to when she was in school, I believe it was the earliest, and I don't recall if I said what grade or, but school, and then to her high school graduation, I remember we went to that, and then I went to when she joined the Navy and when she got married and then the night of the incident.

Q Okay. During the session when you were going through your regression and coming back up to the date of the actual death of her husband, did she discuss martial problems they had had?

A No, not during, not during the hypnotic session; no.

Q Did she at some other time?

A I asked her about their marriage and there (p. 926) are notes in here about that.

Q Would you refer to them?

A Yes. She said that they got along fairly well, that he had never hit her. He had tried once when he was drunk, and that the night of the incident was the first time he had gotten rough with her, you know, shoved her, pushed her around, and that he had been drinking that night and that their problems in her, their marriage had mostly revolved around a drinking problem he had.

Q Okay. Did she mention any kind of drinking problem she had?

A I asked her about her drinking history and she said that she had, the last two years of her first marriage that she drank pretty heavily. She indicated that she had

drank moderately during the four years that she was married to her deceased husband and that she had been drinking the night of the accident.

Q Did she tell you how much?

A I asked her how much and she said not a lot, it's difficult to get exact amounts, she said she was not intoxicated, she had been drinking.

Q When you put her under hypnosis, was she later (p. 927) able to remember in detail how much she had to drink?

A I didn't ask her how much she had to drink.

Q You didn't think that was pertinent?

A That may be pertinent, but when you're hypnotizing someone you get the most accurate information by not asking specific questions but just letting them go through what they're seeing, some spontaneous type of verbalization that's—research shows that you get a less contaminated memory by using that process so I used that process for the most part. I did ask some detailed questions later on, but one of the problems that you will note on the tape is that it's very difficult to understand anything that she says. She's very upset, she's crying through much of it, and I couldn't understand her for a lot of it and it's just very difficult to understand what she's saying.

Q Did it ever get to the point where you could understand what she was saying?

A Just little bits of, and pieces.

Q When you said earlier that lots of times that police hypnotists don't know what they're doing or they don't know how to handle people if (p. 928) they get in a state of hysteria?

A Right.

Q So they go into, they use a different type of technique where they have them sort of disassociate themselves from the situation?

A Right.

Q As if they're looking at it on a tv or something like that?

A Yes, right.

Q Did you use that?

A I used that in different parts.

Q Did that work?

A Yes. She was able to do that. It calmed her down somewhat, but, you know, I used it at various times. Sometimes when she would get very upset I would resort to that technique. Lots of times I just let her cry. It didn't bother me, you know. I just tried to wait to see what would come of it.

Q When you said she's a very good subject for hypnosis, I have read somewhere that sometime people who are faking hypnosis act uncontrollable or sick or emotionally upset throughout the session; is that correct?

A Well, I haven't read that anywhere. I'm sure (p. 929) that people can fake that. I wouldn't say she was uncontrollable in any way. That's not what I meant to

imply, but she was upset. I think that it would take a very skilled actress to pull off what I saw. She was obviously upset, she was crying real tears and seemed to be in pain and involved in what was going on. I have hypnotized people that I felt sure were faking it and I have seen some pretty hysterical, dramatic-type of performances and I know what you're speaking of. That's not what I saw with her.

Q Okay. So I understand that under, when she was under this, under hypnosis in the first session that you did not ask her any direct questions; is that what you're saying?

A Well, I'm not sure that I didn't ask her any that time. I may have asked some but very few. The second time I asked more.

Q Is that why you had another session?

A Well, I don't know why I had another session. I just decided she was a good subject and I just decided that I would try one more time to see if we could get any memory of what had happened. As I said, you get the most accurate (p. 930) information by letting the person just talk.

Q I understand that.

A Okay. And then on the second and third sessions, you might try for more details.

Q Did you try for more details?

A Yes. On the second one, I asked more direct questions.

Q Did you ask her on the second one how much she had been drinking?

A No, no, I didn't ever ask her questions like that.

Q Wouldn't it be important? Doesn't alcohol sometimes have a, play a part in a person's having amnesia or having faulty memory?

A Well, a lot of things play a part.

Q Drinking isn't one?

A Drinking can be one, being very upset. I wasn't trying to determine why she couldn't remember. I was only trying to help her remember.

Q How much she had to drink wasn't important?

A It really wasn't part of what I was doing. No, it wasn't important to me.

Q Okay. How long was this first hypnotic session?

(p. 931) A Oh, I don't know. Probably close to an hour.

Q Okay. And then did you talk with her afterward?

A Yes.

Q And how long did you talk with her?

A Just briefly. I spent enough time with her to make sure she was okay, she was oriented, she wasn't confused, she wasn't upset, that she looked calm and settled down, I feel safe with her leaving the office.

Q Did you talk to her about what had gone on during the hypnotic session?

A No. I asked if she was comfortable, how she felt, that particular kind of thing.

Q Did she say anything to, different to you following the hypnotic session? Did you go over the story again with her, her recollection of the night her husband was killed after she came out from under hypnosis?

A No.

Q Don't you generally do that?

A No. I decided that it would be Mr. Putman's job. If she remembered anything, she could tell him.

Q Okay. So you didn't, at the conclusion you (p. 932) didn't go through her story again with her to determine if her memory of the incident was any different than it had been prior to the hypnotic session?

A No. I got through with the session, I felt clear that she didn't remember anything, there was nothing that I heard during the session that was different from what she told me during the interview.

The Court: We're going to recess for lunch. The court will take up again at one-thirty.

(p. 933) Q Dr. Back, I believe that you said, or earlier on direct examination that you made notes of your conversation with Mr. Putman when he called you on the phone?

A Yes.

Q Do you have those with you at this time?

A Yes.

Mr. Clinger: Your Honor, I'm going to move for the introduction of these with the idea they can also be substituted with a copy so she can get her original back.

Mr. Putman: I don't object, Your Honor.

The Court: All right. It's admitted. What's that? Number 2?

Mr. Clinger: State's 1, Your Honor.

The Court: All right.

By Mr. Clinger:

Q I believe you said that he told you as you (p. 934) have wrote here, can't remember how gun went off and what she did with the gun?

A I'll have to see.

Q Okay.

A Yeah, that's—

Q Okay. Can't remember how gun went off and what she did with the gun.

A With the gun; uh-huh.

Q What does that say?

A At the end of the conversation, I noted thing that he told me in the beginning of the conversation before I realized exactly what he had wanted. I stopped, so I noted the things, the fact that I knew and those were the ones that I knew.

Q He had given you?

A Yes.

Q Such as after walks to the door?

A Yeah. I remember him telling me she didn't know what happened after she walked to the door.

Q He's been drinking?

A Yeah, and that they got into a fuss.

Q Fuss?

A He showed her. He wouldn't let her have some (p. 935) pizza. Those are the only facts that I knew about it.

Q Okay.

Mr. Clinger: I'll move for its introduction and we'll make copies.

Mr. Putman: No objection.

The Court: All right. It's admitted.

By Mr. Clinger:

Q When you were, when you began this interview with her which I call a history gathering interview which you said lasted approximately an hour, when you made the notes?

A Yes, that's the same kind of interview we do on, on any new patient that comes into our office.

Q In this history interview, you also go over her version, what she could remember prior to the hypnosis?

A Yes.

Q You don't term that the pre-hypnosis interview?

A I would call that an interview such as I do (p. 936) with anyone who comes into our office. A pre-

hypnosis session to me would have to do with getting the person ready for the hypnosis, such as getting them comfortable, doing some relaxation procedures and that kind of thing.

Q Testing them to see how good a subject they're going to be?

A Yes sir. For example, a good example, the arm levitation and that sort of thing.

Q And I suppose you did that sort of thing?

A Yes, sir.

Q And that's in the tape recording?

A Yes.

Q When you were talking to her in this interview, in this history interview, did you tell her that, the areas that Mr. Putman had expressed concern about?

A No, I didn't.

Q Did you ask her—did you discuss with her this question of her not being able to remember how the gun went off?

A I'm not sure what you mean. What way?

Q Did you talk to her about how the gun went off?

A I told her to tell me all she could remember about (p. 937) the night of the incident.

Q Okay. So she told you how the gun went off?

A No.

Q She had no idea?

A No.

Q Did she later, during the hypnotic interview or the hypnosis session, remember how the gun went off?

A No.

Q And then you said after the hypnotic session you had no post-hypnotic interview with her?

A Not specifically about the incident. I did spend some time with her, as I told you, to make sure she was okay and comfortable. I didn't ask her. I felt that I knew what she had remembered because I heard it during the interview.

Q Right. What she remembered during hypnosis?

A Right.

Q Isn't it customary after they have talked about things under hypnosis, isn't it customary then to talk to them after that they have come out from under the trance to see what they remember, if their memory has changed any or changed, if she recalled the things they talked about (p. 938) during the hypnosis of if they can even recall what they talked, told you about before the hypnosis?

A I don't know if that's customary. The thing that is customary is to make sure that the patient is okay, that they're oriented and comfortable. I think it would have to do with the purpose of the hypnosis what would be customary.

Q Uh-huh.

A You know.

Q Let me ask you this: the purpose was to see if she could remember what she did with the gun or how the gun went off. Did you ask her those questions after the hypnotic session?

A I don't believe that I did. I may have, but I don't believe that I did because I felt sure that I didn't hear any new information, anything different from what she had told me in the history gathering.

Q Is it possible that sometimes after a person has been under hypnosis that even though they may not have recalled things or said things during the hypnotic session that afterward their memory may come back to, as to things (p. 939) that they heard?

A Yes, that's possible.

Q Wouldn't is have been important to see if that was the case here?

A Only a few minutes had elapsed.

Q How long was the hypnosis session?

A Well, it was about an hour, but the very last part of it had to do with the incident and she did not recall anything different so right after that was only a few seconds later. I wouldn't expect her to recall something different.

Q Okay. During the history session there, did you go over with her in detail exactly what had happened leading up to the death of her husband?

A I went over that with her as detailed as I could without asking detailed questions, which I did not want to do.

Q Even in the pre-history?

A Yes. As I pointed out to you, people who ask detailed questions such as policemen or people who are doing investigations that ask detailed questions elicits more information that is inaccurate than if you let a person spontaneously (p. 940) tell you something.

Q Whether they're under hypnosis or not?

A That's correct.

Q Did she tell you about an incident that occurred the weekend before the death of her husband in which her husband had threatened to leave her?

A No, I don't believe she told me anything about that.

Q Or that she threatened to commit suicide?

A No.

Q Did she tell you that she had ever had a problem of that serious nature before this evening?

A No. She told me that they were arguing or upset about moving to a trailer and that she felt they needed to discuss this and that he had seemed to be, I believe her words were "set on moving to this trailer".

Q Uh-huh.

A And that was something that they were upset about this evening.

Q So they were fighting that evening, fussing?

A Quarreling. They were arguing, I believe; yes.

Q Did she tell you how long the quarreling (p. 941) lasted?

A No, I don't believe she told me exactly how long that lasted.

Q Did she talk about his younger brother having been there?

A Yes, sir.

Q Was the quarrelling going on at that time?

A Yes, I believe it was.

Q The quarrelling had gone on all day?

A I don't know that she said it went on all day.

Q Did she tell you she had been drinking mixed drinks all day?

A She had been drinking.

Q Did she tell you what she had been drinking?

A I don't recall.

Q Okay.

A I think I would have written it down if she had.

Q Okay. Didn't matter to you whether it was hard alcohol or beer? Just didn't make any difference?

A The purpose of me seeing Ms. Rock did not have anything to do with me making any judgment about why something happened or if something happened. I tried very hard to limit what I was doing to the hypnotic session only.

(p. 942) Q What did she tell you happened then that led up to his death?

A What she told me—I might need my notes, I'd like to have my notes.

Q Well, do you have to have these notes to remember?

A I don't have to. I feel—

Q I mean the only question I have got is you said she talked to you about an hour and that clearly these don't have anything, everything she said.

A Right.

Q All right. Do you need to have these notes to refresh your memory—

A It would help me.

Q Okay.

A Okay. As I told you previously, she mentioned to me something about moving out to a trailer and that he was set on moving out to the trailer and that she felt they should discuss it more, she was upset about it, she went to another room to lie down. While she was in another room resting the brother came in and then he left and he either brought pizza or ordered pizza, somehow pizza was in the house. (p. 943) At that time, after the brother left, she came out because she wanted to eat some of the pizza and her husband wouldn't allow her to have any pizza and she said then she would go out and get pizza and he wouldn't allow her to leave the house.

Q Okay.

A Then he pushed her against a wall.

Q He pushed her against the wall?

A Uh-huh.

Q Did she describe to you how he pushed her?

A No.

Q You never had her act it out or anything?

A No.

Q Did she, did she say what portion of her body he pushed.

A No, I did not want to ask direct questions like that. Do you understand? That just elicits confabulation. I can't ask what part of your body did he push. That elicits more inaccuracies.

Q You mentioned the term "confabulation". Would you explain that?

A Right. Well, if you ask a person a lot of direct questions, they, they're trying to (p. 944) answer you so they tend to fill in the gaps.

Q Confabulation?

A They have pieces of memory and they will tend to fill in the gaps with things. I didn't want that, that to happen, so I only asked her to tell me what she remembered.

Q Okay. I assumed—

A I wrote down brief notes.

Q I assume if a person would confabulate while just in a normal, waking state or no hypnotic state, the danger of confabulation is even greater once they're in the hypnotic state; is that true?

A I don't know if that's true. I think it's less of a danger is the hypnotic session is done with safeguards. There is a great danger of confabulation of a person who is not hypnotized and is being interrogated. For example—

Q You have said that several times. Let me ask you, are you saying a person who might, who's the type of person who might confabulate during the normal waking interrogation or interview is less likely or is the same likelihood of his confabulating once he's (p. 945) under hypnosis? Are you saying that?

A I don't think you can make that comparison because you have to know what the hypnotic session consisted of. A person who's under hypnosis is very suggestible.

Q Right.

A And if you suggest things to them, they're more likely to confabulate, but everybody does that. Our memories are not perfect.

Q Uh-huh.

A Memory is not like a recording up there.

Q Let me ask you this—

A Everyone does that.

Q Isn't is a fact that many of the experts in the field of hypnosis, including Dr. Orne that you have recognized as an imminent expert in this field, views this phenomen of confabulation as one of the true hazards that accompany the use of hypnosis or memory enhancement through hypnosis?

A Yes, sir.

Q In fact, don't they believe that a person is much more likely to confabulate while under the influence of hypnosis than in a normal, waking state?

(p. 946) A Yes, I believe that they are.

Q All right. But you don't agree with that?

A I didn't say that. I do agree with that.

Q Okay. All right. I'm sorry. I didn't understand that. Okay. So she shoved—he shoved her up against the wall and then what happened?

A She said there was an end table in the corner that had a gun on it and she explained at that time that the reason there was a gun on the table, she and her husband was working as night watchmen, so to speak, for the business that was behind their residence. She said that she picked up the gun because she didn't want him hitting her, shoving her any more. He would not let her out the door, he slammed the door, and then I have it in quotes, "the gun went off and he fell and he died" and at that point she looked very near tears.

Q Okay. When she said he slammed the door, is that all she said? He slammed the door?

A Yes, sir.

Q And the gun went off?
And the gun went off, then he fell and he died.

Q Is that all she said?

A That's what she said at that point; yes.

(p. 947) Q Did she change that story under hypnosis?

A No.

Q Did—

A No.

Q Did you, she say anything to you about him striking her again?

A At thi s point?

Q Uh-huh, after he shoved her up against the wall?

A This is what she said to me in the interview, what I just read to you.

Q Okay. Did at any time—you also concede you didn't get every word down, so I'm trying to—I'm not trying to trap you. I'm trying to see if there were anything—

A If she had said to me "then he hit me again", I would write that down.

Q Did she say anthing to you about when he slammed the door he struck the gun or struck her?

A No. If she had said that, I would have written that down.

Q Okay. Did she say anthing about where she was standing when he slammed the door?

A No.

(p. 948) Q Did she say anything about any more blows to her or the gun in any way?

A She said right here, what I have read to you.

Q Okay.

A That's the basis of, I mean it may not be word for word. In summary, this is the meat of what she said. If she said anything like that, I would have written it.

Q So as far as what your notes show and what you can recall, after he pushed her one time there was never again any physical contact between her and him?

A She didn't mention any physical contact.

Q Okay.

A No.

Q All right. Did she talk to you about what? Her holding the gun?

A Not at this point, no.

Q Did—she did some later?

A In the hypnosis she did talk about holding the gun.

Q What did she say there?

A Which part?

Q About holding the gun?

A I had her go back to the night of the incident (p. 949) and I had her picture what was happening and she, and I asked where is the gun and she said it's in my hand, she saw the gun in her hand.

Q What else did she say under hypnosis about that?

A That's about all.

Q Did she say anything about him striking her under hypnosis?

A You would have to listen to the tapes. I'm not sure. She did mention the door slamming, the gun going off, but it's very difficult to understand what she is saying.

Q Did she—did you talk to her, do you know what type of gun it was?

A No, I don't. I did know, but I don't remember any more.

Q Who told you about what type of gun it was?

A Well, actually she told me, then I asked my husband about that kind of gun and so, but I don't remember what kind of gun it was.

Q Is it in the notes there when she tells you what type of gun it was?

A No.

Q That's once again, not—you didn't consider it relevant?

(p. 950) A She said it was a handgun.

Q Well, talking about it being a double action or single action gun?

A I don't know about that.

Q If she had told you, like, for instance, you know the difference between, some guns have to be cocked before they're fired?

A I know that now, but I didn't know it at the time.

Q She didn't tell you?

A No. My husband told me that later.

Q How did he know about it?

A Well, my husband knows more about guns than I do.

Q How did he know what type of gun was used in this incident?

A I was talking to him about it.

Q Okay. So she didn't tell you what type of gun it was and so you had no idea it was the type of gun that had to be cocked before it was fired?

A I didn't on the first session.

Q You did on the second session?

A I had talked to my husband. He told me that some guns have to be cocked and some don't. (p. 951) I thought all guns had to be cocked. The only kind of gun that I, I have only shot one gun and it had to be cocked. I didn't know some guns don't have to be cocked. I thought all guns had to be cocked.

Q In the history interview, did she say anything about how, expressing surprise about how the gun became cocked?

A No.

Q In the hypnotic interview?

A No.

Q Or the post-hypnotic interview?

A No.

Q Or discussions?

A No.

Q Did she tell you where she was pointing the gun?

A I asked her where the gun was pointing and I believe she said to the wall.

Q Was that in the history interview or the hypnotic session?

A The hypnotic session. In the second session, I asked her more direct questions. I think it was in the second session that I asked her things like where was the gun pointing, where (p. 952) did you see the gun, is the gun cocked, and some questions like that.

Q Did she tell you in the history session about what she did with the gun afterward?

A No.

Q Did she tell you during the hypnotic session what she did with the gun afterward?

A No.

Q Okay. Now, exactly what technique did you use to put her under hypnosis?

A Okay. Well, I used—first I used deep muscle relaxation and then I used arm levitation suggestion, and then some regression techniques.

Q Okay. I don't want to go through a year of hour and a half sessions to learn this, but what are arm levitations?

A Well, arm levitation serves two purposes. One, it helps you to know if the person is a good subject by seeing if you can in fact do this in a reliable way, and it also serves to show the patient that this can happen, which makes them more relaxed and more susceptible to

believing that they can be hypnotized and it's easier to hypnotize them after you do something like that.

(p. 953) Q Do you remember what detailed questions you had asked her in the first hypnotic session?

A I asked her very few in the first one. I really—I really don't remember any specific ones. It's been a long time ago.

Q Okay.

A In the second one, I then know I was asking her some questions like, you know, where's the gun, you know, and she said, would say it's in my hand, then I would say where is the gun pointing and then what did you see and I know I asked her if the gun was cocked and it was only after that that I learned that some guns don't have to be cocked.

Q Okay. After or during that session or before it, did you do any—aren't there some tests you can do sometimes to determine if they're faking hypnosis?

A No. There are tests—well, some people think, I have seen people use some things like that. There's nothing real clear in the literature about that. There are tests you can use to see if people are good subjects.

Q Uh-huh.

A And those are some things I did do, the arm, (p. 954) well, the arm levitation is one, eye roll is another one, and where you ask the subject to look up as high as they can. People who can look, keep their eyes open and look way up are easier to hypnotize than people who can't roll their eyes way up in their heads.

Q I believe you said after the first session you didn't conduct a post-hypnotic interview, you just made sure she had calmed down?

A Right.

Q And you sent her on her way?

A Right.

Q Did you call Mr. Putman and report to him?

A I don't remember if I called him or if he called me, but we did speak by phone.

Q All right. Could you tell us what that conversation consisted of?

A Basically it consisted of me saying that I don't think that she knows any more now than she did before the session, knowing nothing at all came of it, and that's that.

Q Okay.

A But that she was a good subject and that I thought she was hypnotized, it was difficult to understand her but that I didn't hear (p. 955) anything new in the session from what she had told me before, that I was willing, I said sometimes if you hypnotize somebody a second time they're more relaxed. I will hypnotize her one more time if you want me to, and he said fine.

Q All right. What was the purpose of the second, you-all actually decided there would be another hypnotic session?

A Yes.

Q What was the purpose of it?

A The same thing.

Q To try and get more details?

A Yes.

Q So I believe you said you brought her back, and how long did you talk to her before you hypnotized her the second time?

A Well, we talked for a little while.

Q Did you talk about the reasons you were going through it again?

A I don't remember. I don't remember if I specifically told her why we were doing it again. I know that when she left the first time she did not know she was going to be coming back the second time.

(p. 956) Q All right.

A The second time that she came back, I was late for the session because of something that came up at the hospital and her mother was irritated with me about it and so Ms. Rock, Vickie and I discussed that for a little while and she discussed with me some of the pressures that her family had been under and her father's death and some pressures her mother had been under, so we just talked for a little while about that.

Q Did you take notes on that?

A No.

Q Any reason why?

A Well, I just didn't, it didn't have anything to do with what we were, the incident at all. She was talking about her mother being angry in the waiting room.

Q Didn't—

A Then we started the session.

Q Well, are you telling us that she had no idea why she was coming back for another session?

A I'm sure she did. I'm sure Mr. Putman told her why she was coming back.

Q Well, in your own mind, based upon your (p. 957) conversation with her that you didn't make any notes of, are you convinced that she knew she was coming back so you-all could make another attempt at getting more detailed information out of her?

A Yes.

Q So once again she was, but you, you made no notes that conversation?

A Right.

Q Would you agree with Orne and some of the other experts that a lot of times, that the motivation of a patient is important to know, may sometimes, may be an important part in how they respond during the hypnosis session?

A Sure.

Q Such things, as self-preservation?

A (Witness nods to the affirmative.)

Q Such things as trying to help themselves in a criminal case?

A Yes.

Q And so the fact that she knew then that she was there to try to get more detailed information out would be an important factor for us all to be aware of; isn't that correct?

A Correct.

(p. 958) Q All right. And I believe you said then you hypnotized her and this time you did ask her for detailed questions?

A I asked more detailed question this time.

Q All right. Now, isn't that in violation of everything you have been telling us about, that you don't ask detailed questions because people can confabulate?

A No. If you read the literature, it's usually acceptable after the first session and the second session or maybe subsequent sessions to ask more direct questions.

Q No danger of them confabulating?

A You have to be very careful how you word things and what you said. There is a danger. You can't, you don't want to suggest things, you know, if you say—

Q We understand that, but you ask more detailed questions, but now you're saying that the experts say, are we talking about Dr. Orne, too, that he says that there's no danger of this, danger of confabulation, that it blows up, dimi-ishes, as the more, the more hypnotic sessions?

A I didn't say that.

(p. 959) Q I thought you did.

A I'm sorry. You misunderstood me.

Q What are you saying about it?

A I have said that in the first session it's better to let the person just spontaneously tell you what they remember, that you're likely to get more accurate information than if you ask real direct questions.

Q All right.

A Okay. Later on, you might, it says in the many articles you might want to ask more direct questions to get more detailed, more information.

Q Do you remember before lunch when I asked you why you had the second hypnotic session?

A Yes.

Q Do you remember what your answer was?

A I said I really didn't know why.

Q Can you tell us why that your answer has changed since lunch?

A My answer has not changed.

Q Didn't you just say a while ago you and Mr. Putman decided, based upon your analysis she was a good subject for hypnosis, and if he wanted you to you would give it another shot, (p. 960) and get more detailed information?

A Well, yes, and that's true. I'm just saying I didn't have any specific reason for doing it. I just decided, well, we'll try again, but I was trying to say, is I didn't feel real strongly about it one way or the other.

Q Okay. After the second session, well, and you asked these more detailed questions, did you get more information?

A No.

Q In response to your detailed questions, did you get any more detailed answers?

A No.

Q Did she say anything different in the second hypnotic session than she had told you, oh, back in the pre-history or the pre-hypnotic history interview?

A There are only two things that I can recall that were different in the second session. She did mention he wants the gun, he wants the gun. She mentioned that a couple of times.

Q Did you ask her about what she meant about that?

A No. You don't ask questions like that in hypnosis.

Q Oh, you don't?

(p. 961) A You don't ask what do you mean by something. You know the person is in a process and you just kind of let them go with that. The only other thing that was different in the second session was she said something about going to the bar for help and those are the only two things that—

The Court: I'm sorry, I didn't catch that.

Dr. Back: Going to the bar for help.

The Court: Uh-huh.

By Dr. Back:

A Those are the only two things that were new information or anything that I hadn't heard before.

Q Let's see, after that hypnotic session, and I suppose you tape recorded it?

A Yes.

Q Did you see any need to hypnotize her further?

A No, I really didn't. I felt that nothing had really been accomplished.

Q Okay. Have you, you have had occasion to (p. 962) view a videotape of another hypnotized—placing somebody into a hypnotic trance and going through a hypnotic session with them?

A A videotape?

Q Uh-huh.

A I can't recall one specifically. I may have seen one in the internship. We saw lots of videotape of all kinds of patients in different sessions.

Q Do you remember we were talking a while ago about the fact that sometimes that a hypnotist can be fooled by a patient?

A Yes.

Q And I believe that you—would agree with the statement that sometimes there are alleged giveaways that the patient is faking or not as deeply under the trance as they might otherwise be appearing to be, that the hypnotist might miss?

A Well, yes.

Q Would it seem to, let's say, for instance, if you were asked to evaluate another hypnotic session?

A Uh-huh.

Q Between another hypnotist and somebody he had (p. 963) hypnotized, if he came to you and said I'd like you to evaluate this session to, for the purpose of seeing if I missed something, if you think this person was faking or lying or confabulating or whatever, do you think it would be an advantage if you were to have a videotape to view?

A It might be; yes.

Q As opposed to just a tape recording?

A Uh-huh.

Q Because when—you agree that there are things like the body movement sometimes are giveaways?

A Well, yes.

Q Things like respiration rate is watched and the way the arm levitation is done, that kind of thing?

A Yes.

Q Would you say some twitching or movements by the patient may be sometimes giveaways that maybe they're not as deeply under as they act?

A Well, I'm not sure what you're—

Q Reaching up and scratching their face when they're supposed to be in the sixth level of subconscious or whatever?

A Right. Well, I think those would be giveaways (p. 964) that most people would notice.

Q I'm saying, though, that aren't those things some things that might possibly help you evaluate that session?

A You mean if I wanted a second opinion?

Q Uh-huh.

A And if I wanted a second opinion, someone would certainly have to observe it.

Q Okay. But did I hear you say that you're not aware of any of the experts in the field that advocate videotaping these sessions particularly in criminal matters?

A No, I didn't say that.

Q Are you aware of some?

A Yes.

Q Who?

A I said to you earlier I was aware that many of them say that audio or video but that video is certainly good if you can do it.

Q Isn't it preferred?

A I don't know that I have read that it's preferred. I'm not saying that it doesn't say that in research. I know that I have read, they say either/or.

Q And I believe that you said earlier, agreed (p. 965) with the idea that there are in this, in the contact that the hypnotist has with a patient prior to the actual hypnotic session, that there, it's ripe with danger, I guess you would say, of the hypnotist doing something even unconsciously that might be suggestive and might play a part in how the patient responded under hypnosis?

A Right. If the hypnotist has some information about the answers, say, or who they think committed a

crime, well, then there is a danger they might in some way subconsciously lead the patient in that way. That's why it's best if the hypnotist doesn't know any information about that, the facts, or what could have happened or that I know of this—

Q Isn't there a real danger in the hypnotic session or looking at it from start to finish, that if you gained the trust of a patient and they like you or they trust you and they understand that you're out to help them, not hurt them, that isn't there a danger sometimes that they, this builds within them a desire to please you and come up with answers to (p. 966) things you're looking for?

A Yes, that's true.

Q And isn't it possible, say, that like if during this history that you were taking and you are discussing that, you discussed some of the things, some of the reasons you were having these hypnotic sessions, isn't it possible that at that time the patient began to want to make sure that you got answers for going to all the trouble of putting her under hypnosis? Isn't that possible?

A It's certainly a possibility.

Q That would be one more reason for, let's say, recording the history-taking session, just to judge and see if you did, say, mess up and were too suggestive?

A I'm sure that videotape would be helpful in all instances.

Q Or even a recording of your interview with her?

A Uh-huh.

Q I believe that—one minute, please—and I believe you said you have the tapes of your two hypnotic sessions?

A Yes.

(p. 967) Q Do you have anything to play them on? No.

Q What kind of tapes are they?

A It's just a cassette tape, small cassette.

Q Are they both on the same tape?

A Yes, uh-huh.

Q Would you want to take them out and, I don't think or I don't know if they have anything to play them or not.

A (Witness complies.)

Mr. Clinger: Your Honor, I'm going to ask that the tapes be played.

The Court: Okay.

Mr. Putman: Your Honor, may I suggest that we do this after the end of cross examination and redirect, if any, of this witness has been concluded? She has patients that are waiting on her and I know she's been subpoenaed by the (p. 968) prosecution, but at the same time I would like to extend as much courtesy as possible to people that need her professional help.

The Court: Well, I don't understand it, but I don't see how the cross can be completed till the tape is played.

Mr. Putman: I gather since there are two sessions anywhere from an hour to two hours worth of tape recording there.

The Court: Well, I'm not sure I can do anything about that.

Mr. Putman: Your Honor, in addition to that, I'd like to move that anything done with the tapes, that it be impounded by the Court and, further, that all of it be listened (p. 969) to by the Court before the Prosecuting Attorney and when they do it it will be under circumstances which the tape is always under the control of the Court and that defense counsel be given an opportunity to be present at all times.

Mr. Clinger: Your Honor, I have no objection to the tape being admitted into evidence and be in the custody of the Court Reporter, that doesn't have anything to do with it being played right now. I agree with the Court. I can't complete my cross examination until we see how she conducted the interview.

The Court: Well, let's proceed with (p. 970) (REPORTER'S NOTE: After a brief recess, court reconvened with the following proceedings.)

The Court: All right. Let's play the tape. I need to know which is which, unless they're internally designated.

Mr. Clinger: Your Honor, at this time I will offer, I will ask that the witness, to take the covering there off the tape.

Dr. Back: I though you already had.

By Mr. Clinger:

Q All right.

A Start on this side.

Q I believe you were saying that the first interview is on Side A?

(p. 971) A Uh-huh,A, and I believe that the tape ran out during the first interview and I flipped it over, so part of the first interview then is also on Side B. You just need to flip it over at that point.

* * *

(p. 1006) (REPORTER'S NOTE: Side Two of State's Exhibit 2 played to the Court. After the tape was completed:)

The Court: All right. Go ahead, Mr. Clinger.

CONTINUING CROSS EXAMINATION

By Mr. Clinger:

Q Dr. Back, to be quite honest with you, I was shocked at the ending of that last tape. Wasn't (p. 1007) that in fact a post-hypnotic suggestion to the Defendant that when she came out of the trance and went back over to her attorney that she would have a vivid memory of all these things she stated to you under hypnosis?

A That's exactly right.

Q Isn't that post-hypnotic suggestion? Doesn't that fly directly into the face of everything that Dr. Orne talked about, about this being an abuse of hypnosis, implanting the things they can barely remember so they'll be crystal clear so that when they take the stand later it will come out as if it's been strong in their mind from start to finish?

A During hypnosis you always suggest that the person will be able to remember or will be able to see things

that was clear all the way through. You always suggest they will be able to.

Q Remember earlier when we read excerpts from Dr. Orne's treatise in which he stated that it was a violation, that it's wrong, that it sets up a phony witness?

A I'm not sure what you're asking.

Q Can you explain to the Court why it was (p. 1008) necessary for you at the end of that to tell her that when she woke up she—from that point on would remember everything vividly and clear, awake, and when she looked at the, at Mr. Putman's eyes she would remember all these things as if she had remembered them all along, remembered them strongly? Why was that necessary if you're not being an advocate in this case?

A It's always necessary to, you are going to get a person to remember something, to give them the suggestion that they will remember it.

Q Why didn't you do it as the close of the first tape if you always do it?

A I gave her suggestions all along that she would be able to remember and remember like—

Q I didn't hear them in the first tape. Did you close, have a grand finale on the first tape saying these same things you did on this one?

A No, I didn't.

Q You know you were saying on direct examination or cross examination you don't ask detailed (p. 1009) questions?

A I did.

Q Are you saying you didn't ask detailed questions in the first hypnotic session?

A I did ask some, but you said, in the earlier part. I try to let her pretty much let her say what she remembered. What I repeated were the things that she was saying.

Q Remember on the tape just now when I could hardly hear her asking this specific question: before he grabbed his chest, what do you see? Is that not asking or trying to elicit a specific detail?

A Yes. I'm trying to get her to see the events as they happen.

Q Is that direct? Isn't that a detailed question that you said you avoided in the first one?

A She said he grabbed his chest and I said before he grabbed his chest what did you see. I tried to move her backward.

Q You asked her look for the gun, where is the gun?

A Right.

Q Isn't that trying to elicit a detailed, a specific detail?

(p. 1010) A Yes. I told you in the second session I asked more specific questions.

Q I'm talking about the first session. I got these notes right out of the first session.

A Well, I may have asked that in the first session.

Q Do you remember the—do you see anything else—

Mr. Putman: Your Honor, he's not letting her answer the questions.

The Court: Yeah, you're cutting her off.

Mr. Clinger: I apologize to the Court, Your Honor.

By Dr. Back:

A Pardon me?

Q You asked this: Did you see anything else. Did you ask that the first session?

A I may have.

Q Do you remember?

A I--

(p. 1011) Mr. Putman: Your Honor.

Mr. Clinger: I think that's a legitimate question.

Mr. Putman: Your Honor, I'd ask that you instruct him to allow the witness to answer.

The Court: Just slow down a little and let her answer.

By Mr. Clinger:

Q Do you remember asking the specific question "Where is it pointing" in the first session?

A I don't remember specifically, but I probably could have asked that. I don't see there's anything wrong with that.

Q Is that not an attempt to elicit very specific details of major importance?

A Yes. I'm trying to get her to remember and to see the events.

Q Doesn't that fly in the face of the testimony earlier you don't ask specific questions because they're going to confabulate?

A I said you don't ask leading questions.

Q Leading now?

A Yes.

(p 1012) Q Is it, has it changed now from the question of asking leading questions as opposed to the questions asking for specific details? Wasn't that what we were talking about a while ago?

A You sometimes have to ask detailed questions, but you try not to ask questions that would lead the witness in any way to bring up information that they may not have mentioned to you.

Q All right. Now, of course, in the second session you said what happened, amongst other things, what happened when, while he fell to the floor? Did you ask that?

A I don't think I asked what happened while he fell. I think she said that he fell to the floor and I said what happened before he fell to the floor.

Q All right. Another one, specifically, what did you see right before he fell to the floor?

A Yes.

Q Can you see the gun?

A Yes.

Q Is the hammer cocked?

A Yes.

Q Look at the gun. Is the hammer cocked?

A (p. 1013) Yes. She had mentioned when I said do you see the gun, she said her thumb was on the hammer. That's on the tape.

Q Can you remember when you cocked the hammer?

A Yes. I asked did she cock the hammer.

Q Can you remember cocking the hammer?

A Yes.

Q That's five questions. Suddenly you're asking of the gun. Now, a while ago did you not, in response to some cross examination, tell me that the only reason you got in the cocking business was because you talked to your husband after the first session?

A No. I didn't know until after the second session that you didn't have to cock a gun. I thought you cocked all guns.

Q Oh. When did it come to your mind to ask all the questions aout the hammer and the cocking of the hammer?

A When she said she saw her thumb on the hammer.

Q It wasn't because of the conversation you had with the defense attorney following the first session?

A No.

Q Was it all on your own?

(p. 1014) A Yes.

Q Asking the same questions five times trying to elicit that? Is that not in violation, violating the charm, the spell, the power you have over a person under hypnosis?

A I don't believe it is.

Q Forcing them to give you answers—

Mr. Putman: Your Honor, let her answer the question.

By Dr. Back:

A I was trying to get—

Mr. Putman: I'd like to hear her answer.

By Dr. Back:

A I was trying to get her to remember what happened, to see the event, when she said she saw her hand, that she was handling the gun and she saw her thumb on the hammer. I was trying to get her to slowly go through what happened.

* * *

CONTINUED EXCERPTS FROM THE TESTIMONY OF VICKIE L. ROCK CONTINUING DIRECT EXAMINATION

(p. 1025) By Mr. Maglothin:

Q Now then, Vickie, I am looking at Dr. Betty Back's notes and I'm going to go through the notes and ask you certain things about that and the Court has given us reasonable latitude on your testifying as to what happened

on July the 2nd, 1983. It says in her notes "the patient states she and her husband were discussing moving out to a trailer she had previously owned. He was set on moving out to the trailer, she thought they should discuss". Explain to the Jury what you-all were talking aout?

A It was a trailer that we moved—

Mr. Clinger: I think I need to object. Isn't that hearsay?

The Court: Overruled.

Mr. Clinger: I think I was—

The Court: Overruled. Proceed.

By Ms. Rock:

A It was the trailer that I had owned before Frank and I got married and then, out in Avoca, (p. 1026) that was a little ways down from his parents' house and we had been talking about moving out there and he was set on moving out there right away and everything but I felt like that we had to discuss it because there were some, so many things that had to be done to it before we could actually move in.

Q All right. Now, the next statement that she has, she's referirng to you being upset and went to another room to lie down. Now, explain to the Jury where you went?

A I went to the beauty shop which was connected to the apartment and went in there and I layed down.

Q All right. Then it says next "brother came and left". Now, which brother are we referring to?

A Jeff.

Q Jeff? And explain to the Jury briefly what happened?

A Jeff came back for pizza and I went in the room, I was in the beauty shop and then Jeff left.

Q Okay. Were you in it, still in the other room in the beauty shop at the time that (p. 1027) Jeff left?

A Yes, I was.

Q Okay. Did Frank ever come into the beauty shop and say anything to you?

A No.

Mr. Clinger: Object to that as going far beyond those notes.

The Court: Overruled. Go ahead.

By Mr. Maglothin:

Q In the next statement that Betty Back had, Dr. Betty Back says in her notes "she came out to eat some of the pizza, I'm sure it's of the pizza, he wouldn't allow her to have any, she said she would go out and get something to eat, he wouldn't allow her". Okay. Now, explain that to the Jury, about that?

A I come back into the room and I asked Frank if I could have some pizza and I was refused the pizza and I decided that I would go and get something to eat and when I began to leave that's when everything happened.

Q All right. And the next statement that you have (p. 1028) in here or that you told Dr. Betty Back, "he

pushed her against a wall and end table in the corner with the gun on it". Now, there's been a number of photographs introduced by the State and State's Exhibit No. 12, is this the end table that you were referring to that you told Dr. Betty Back about?

A Yes.

Q Okay. Show the Jury, and you will have to hold it up so the Jurors on the end can see it. Now, show the Jury where the gun was kept?

A The gun always laid right here, right in here.

Q Okay. When you say always, was the gun ever kept underneath the bar?

A No.

Q All right. And the ammunition for the gun, where had you kept the ammunition for the gun?

A Frank set it by the phone.

Q All right. Now, there's also, in State's Exhibit No. 12, three shotgun shells and there has previously been introduced into evidence State's Exhibit No. 6 and let me have that one there and you hold this one up, (p. 1029) and is that the same end table that's referred to in State's Exhibit No. 12?

A Yes.

Q Okay. Is that where the shotgun was kept?

A Yes.

Q Okay. Was the shotgun loaded?

A Yes.

Q All right. Vickie, had you ever had any experience in shooting that shotgun?

A No, I never shot it.

Q Okay. Who's shotgun was it?

A Frank's.

Q Where did he get it?

A He bought it from a man in Virginia that, he wanted a gun and he knew a man—

Mr. Clinger: Objection to this. Isn't it hearsay. Your Honor?

The Court: Well, I don't think we need to go into the hearsay details.

By Mr. Maglothin:

Q You can't say what someone told you. Just where did he get the shotgun?

A He bought it from another Navy man.

(p. 1030) Q Okay. Do you know whether this shotgun is automatic or pump?

A Well, I know that you have to pull the thing back on it.

Q What thing is that?

A There's a grip or something that you have to pull back on it and then pull forward again.

Q Okay. Now, who showed you that?

A Frank.

Q This .22 that's been introduced into evidence that you bought for Frank on your anniversary, have you ever shot that .22 before in your life?

A No, sir.

Q Do you know the difference between a single action revolver and a double action revolver?

A No, sir, I didn't know anything about the gun when I purchased it. I took it back when I purchased it and showed it to my daddy.

Q Now then, Vickie, the next statement in Dr. Back's report, "well, he pushed her against a wall and end table in the corner with a gun on it". Again, I'm going to have to refer to the pictures and let's look at State's (p. 1031) Exhibit No. 6. All right. Can you show the Jury which wall you're talking about, which wall you were pushed against?

Mr. Clinger: Your Honor, I have got to object to this. This is an elaboration. It's far beyond either the notes or the testimony that was later given. As a matter of fact, I specifically asked Dr. Back if she described which wall or hall and she said no to both and now this is expanding the statement far beyond what the notes were.

The Court: Sustained.

By Mr. Maglothin:

Q Did in fact your husband push you against the wall?

A Yes.

Q The next statement is "she picked the gun up, stated she didn't want him hitting her any more".

(p. 1032) Did you in fact make that statement to Frank Rock?

A Yes, I did, don't hit me any more.

Q Okay. Vickie, why did you pick the gun up?

A To scare him so I could get out of the house.

Q Okay. Had you ever seen him act the way he was acting before?

A No, no, he never never acted like that. He never tried to hit me or anything.

Q What were you trying to do?

A I was trying to get out of the house. I just wanted to leave.

Q The next statement in Dr. Back's notes, "he wouldn't let her out door, slammed door and 'gun went off' and he fell and died". Did you in fact tell Dr. Betty Back that?

A Yes.

Q And explain to the Jury how—well, let me ask you through the pictures. The State has previously introduced a photograph of the doctor's—State's Exhibit No. 11. Is this the door that you were referring to?

A Yes.

(p. 1033) Mr. Clinger: I object. I have got to refer the Court's attention to several specific questions I asked Dr. Back. We were giving her the opportunity to elaborate, telling us everything that was said to her. I remember—

The Court: Let me see it. Which one?

Mr. Clinger: Starting right here, through the next page.

The Court: Mr. Maglothin, approach the Bench, please.

(Reporter's Note: Attorneys at the Bench.)

Mr. Maglothin: I was just going to ask her if this was the door that slammed and what happened at the door.

The Court: All right. Overruled as to that.

By Mr. Maglothin:

Q On State's Exhibit No. 11, is this the (p. 1034) door that you were referring to that slammed when the gun went off?

A Yes.

Q Okay. Now, where were you standing at the time the door slammed?

Mr. Clinger: Object to that. I just showed you statements where she specifically stated to the, Dr. Back, she did not say where she was standing. I'll show you again.

The Court: Yes, I read it. Well, it's not covered in the interview specifically.

Mr. Clinger: If it please the Court, Your Honor, I specifically asked Dr. Betty Back—

The Court: Yes, I understand. I think I will have to sustain that objection.

Mr. Maglothin: Let the record reflect that the witness, if she had been allowed to answer, that (p. 1035) she would have testified that we were standing immediately in front of the door of State's Exhibit No. 11, that she reached

with her hand and tried to get out the door and that Frank Rock grabbed one hand, jumped in front of her, grabbed the firearm, and it went off.

(Reporter's Note: The above proffer was out of the hearing of the Jury.)

By Mr. Maglothin:

Q Vickie, the next statement, "he wouldn't let her out the door", did you tell Dr. Back that?

A Yes, I did.

Q Would your husband, Frank Rock, let you out of the door when you were leaving?

A No.

Q "Slammed door and gun went off and he fell and he died". Now, Vickie, without violating the Court's order, can you tell me how that gun (p. 1036) went off?

A No.

Q Do you know how the gun went off?

A Yeah, I—yes, I do.

Q Now, Vickie, there's—you were in the courtroom when Officer Mike Jones testified?

A Yes, sir.

Q And I have previously, have marked this as Defendant's Exhibit No. 7 for identification. Did you, what, is this a copy of that document?

A Yes.

Q Is that the, your signature on the bottom of the document?

A Yes, it is.

Q Okay. Did the police have you sign that?

A Yes, sir.

Mr. Maglothin: Your Honor, I move to introduce Exhibit 7.

Mr. Clinger: Objection. It's hearsay, irrelevant and everything else, Your Honor.

The Court: Let me see it. Well, this is not admissible.

Mr. Maglothin: Your Honor, it's a, the only (p. 1037) statement she signed.

Mr. Clinger: It's the probable cause statement to the Defendant at her arraignment and that's what they know.

Mr. Maglothin: It's a sworn statement made by one of your officers that she signed when she was in the jail.

The Court: It's not admissible.

Mr. Maglothin: This is Defendant's Proffered Exhibit No. 7.

By Mr. Maglothin:

Q Now then, Vickie, did you tell the officer at the police station that the death of your husband was an accident?

A Yes, sir.

Mr. Clinger: Leading, Your Honor.

The Court: Overruled.

By Mr. Maglothin:

Q Did you tell more than one of the officers?

A Yes.

(p. 1038) DEFENDANT'S EXHIBIT NO. 7
IN THE MUNICIPAL COURT OF
BENTONVILLE, ARKANSAS

STATE OF ARKANSAS

PLAINTIFF

VS.

VICKIE ROCK

DEFENDANT

AFFIDAVIT OF PROBABLE CAUSE

Comes now Mike Jones, Criminal Investigator, Rogers Police Department, and under oath doth state:

On July 2, 1983, at approximately 10.08 p.m., the Rogers Police Department was contacted by a telephone operator who stated that a female subject had called requesting police and ambulance at 801 N. 2nd, claiming that someone had been shot. Officers, Steve Helms and Jim Fawcett, were the first at 801 N. 2nd and found a white male lying on the floor with what appeared to be one (1) shot to the left chest area. At that time, Officer Helms was unable to locate any pulse on the man. Also present was a white female approximately 35 years of age. Officer Fawcett stated that he asked the female where the gun was and after several seconds she indicated it was behind the bar approximately 10 ft from the man on the floor. The female further stated that she had shot the man after a fight. Officers Helm and Fawcett stated the room did not show any signs of a struggle taking place and that the woman did not have any marks or bruises on her body.

I then arrived at the Rogers Police Department where I advised the female, who had been identified as Vickie Rock, 34 years of age, of her rights. Ms. Rock signed a rights form indicating she understood her rights. I asked her what had happened and Ms. Rock stated that her husband had been beating her, she had the gun in her hand and that the gun had gone off. Ms. Rock further states that she had been choked and struck. At that time, I noticed no visible marks or bruises on Ms. Rock's face, neck or arms.

I then went to 801 North 2nd and viewed the scene of the shooting. The apartment showed no signs of a struggle taking place and the pistol, a .22 caliber revolver, was found approximately 10 ft. from the body who had been identified as Frank Rock, 23 years of age.

The man, Frank Rock, was transported to Rogers Memorial Hospital where he was subsequently pronounced dead by the attending physician.

/s/ Mike Jones
Mike Jones, Criminal Investigator
Rogers Police Department

(p. 1040) Q Vickie, I want you to describe to the Jury how you felt when your husband fell in that living room?

A I felt like I had to get him help. I knew that if I didn't get him help he would die.

Q Vickie, did you intentionally shoot Frank Rock?

A No, I don't . . . I wouldn't hurt him for anything.

Q Did you ever point the gun at Frank Rock?

A No.

* * *

RECROSS EXAMINATION

(p 1140) Q Now, do you remember when you talked to Dr. Betty Back?

A I don't remember the date; no, sir.

Q Okay. Now, am I correct on this, that in all those statements in which you talked to the police, we have been reading them to you?

A Yes.

Q And they got up here and testified, would you agree that none of them have ever said you said anything about wanting some pizza?

A As far as I know they have not. I don't know, I don't remember any of it.

Q. All right. These were interviews they had with you, right, after Frank was killed; isn't that correct?

A Yes.

Q All right. Now, do you remember being interviewed by Dr. Betty Back September the 12th, 1984?

A I remember talking to her, but I don't remember the date.

Q Okay. Is that about the right, will you agree that's about the right time?

A I guess.

(p. 1141) Q Approximately a year? You have absolutely no idea whether it was the same year even that Frank was killed?

A I have no idea what the date was.

Q Do you recognize these as copies of her notes she took?

A Yes.

Q Do you see the date up here, 9/27/84?

A Yes.

Q All right. Do you have any argument that's when you talked to her?

A No, sir, I'm not, I'm just saying I don't remember the date.

Q All right. Would this be approximately fifteen months after Frank was killed?

A Yes.

Q Now, did you understand that you were there to be hypnotized, that you could have your memory refreshed of some details about this thing you couldn't remember?

Mr. Maglothin: Object, Your Honor, and ask to approach the Bench.

REPORTER'S NOTE: The attorneys out of the hearing of (p. 1142) the Jury at the Bench.)

Mr. Maglothin: Judge, I thought the order stated she couldn't testify except for those, what was in Betty Back's notes. If we're going up on everything on Betty Back, I'm going to have to call her as a witness and, well, we'll have another half day hearing on qualifications and hypnosis.

The Court: Well, I don't see what the necessity is. What are you getting at?

Mr. Clinger: I'm going down to make sure I can show the Jury what she told Ms. Betty Back when she was under the request to give all the details. She's just got through testifying on direct examination she knew certain things although she wasn't allowed to testify, in fact, the last time she knew exactly. (p. 1143) Now, again, I think I ought to be able to show that this was only inconsistent with her recollection before she was hypnotized.

The Court: Well, I'm not going to permit you to go into the hypnosis or anything about it or anything like that but the first interview by Dr. Back, you can go into that.

(REPORTER'S NOTE: Back within the hearing of the Jury.)

By Mr. Clinger:

Q Now, was it your understanding that you were there, that you talked to Dr. Betty Back for the purpose of later undergoing some hypnosis to, so you would be able to remember certain details you couldn't remember in your normal state; is that right?

A No, sir. Mr. Putman had said that I was going there to be hypnotized so he would know what happened.

Q Okay. You understand you were there to be hypnotized; is that right?

A Yes.

(p. 1144) Q Now, there's been some statements made —did you understand what specific things you were sup-

posed to, he was worried about, whether, about you knowing or not knowing?

A I knew there was things I couldn't remember.

Q Okay. Now, you talked to Dr. Back; is that correct?

A Right.

Q. And you described the incident that occurred there in your apartment that night that wound up with Frank lying in the front door with a bullet in his heart? You described the events; is that right?

A No, sir. She told me not to go into details.

Q Told you not to go into details?

A Yes.

Q Well, did you go into details?

A I told her that--

Q Did you go into details?

A I told her some things about it; yes.

Q Wait. You have heard testimony here in court; right? We had a little hearing over this hypnosis stuff; right? And you were sitting right over there at counsel table?

A Yes.

Q Don't you remember her telling the Judge and the (p. 1145) attorneys that she didn't ask you detailed questions because she didn't want to put words in your mouth; do you remember hearing that?

A Yes sir.

Q Did she—she didn't say anything about not asking you for details?

A She asked me to tell her what had happened, but she also told me that she didn't want me to go into too much detail.

Q Can you show me where that shows up anywhere, anywhere at all? I've got a big old transcript here. Can you show up anyplace she ever told me don't give me any details?

A No, sir. I said she said she didn't want me to go into too much detail.

Q Did you try to describe to her what had happened that evening?

A I told her that Frank had died and I told her—

Q Let me ask you this: did you try to tell her what had happened that evening?

A I believe I did.

Q You believe you did? That's easy to answer; isn't it?

A (No audible response.)

Q Did you tell Dr. Back that you got along with your (p. 1146) husband fairly well?

A Yes.

Q Did you tell her he had never hit you?

A Yes.

Q Did you tell her that the night of the incident it was the first time he had ever got rough with you?

Mr. Maglothin: Excuse me, Mr. Clinger. Let me get my transcript.

By Mr. Clinger:

Q Did you?

A I didn't.

Q Did you tell her this, some fifteen months later after he was dead, that your husband had been drinking that night and there were, marital problems revolved around his drinking problem?

A No, sir, I don't remember telling her that, I don't remember telling her that our marital problems were around.

Q Would it help to look at the transcript of her testimony? Would that maybe refresh your memory? Let me ask you, whether you told her that or not, did you tell her, like you're in here telling this (p. 1147) Jury, that, what exactly did you say?

A I don't remember what she said or did say in her testimony.

Q Well, let me see if I can refresh your memory a little bit. Do you remember the following specific questions that I put to Dr. Betty Back when she was on the stand and were were sitting right over there? Okay. This is Page 37, okay. "Okay. So she told you how the gun went off?", and she says "No", and I said "She had no idea?", and she says "No". Do you remember that give and take between me and Dr. Betty Back?

A I don't remember it specifically, but I do remember that you asked about it.

Q Okay. Well, let's show you here, here on Page 37 of a transcript typed by The Honorable Mr. Dover of that little proceeding, how about looking up here. Can you read that? "Okay. So she told you how the gun went off? No. She had no idea? No"—

Mr. Maglothin: I'm going to have to object to it simply because Dr. Back hasn't testified and I guess he's trying to impeach Dr. Back (p. 1148) who hasn't testified in the trial.

The Court: Well, I don't think he's trying to impeach Dr. Back if he asked if she testified in the presence of this lady certain things and she said she didn't remember, so then he's using the transcript of her testimony to try to refresh her memory. I think he can do that.

Mr. Maglothin: Well, all right, Your Honor. I submit let's introduce the whole testimony.

Mr. Clinger: He knows better than that. It's got all kinds of objectionable material. I have no objection to him using it as long as he stays away from the objectionable material.

By Mr. Clinger:

Q Do you remember that give and take between me and Dr. Betty Back?

(p. 1149) A It's there; yes, sir.

Q Well?

A Like I said, I don't remember it specifically, no, sir, but it's there and yes, it did happen.

Q If that happened and if that's accurate, if this is accurate, what she's saying, "Okay. So she told you how the gun went off? No, she had no idea, no." That's a major difference in your testimony today when right at the end you told Mr. Maglothin over there I know how the gun went off? Isn't that correct? Isn't that the, a major difference between this and your last statement on direct examination to Mr. Maglothin?

A I did not know at that time.

Q Can you—okay. You didn't know at this time?

A Yes, sir.

Q When you were interviewed by Dr. Back, you didn't know?

A No, sir.

Q Now you say you know?

A Yes, sir.

Q Is that correct?

A Yes.

Q Page 40, do you remember Dr. Betty Back also talking about your conversation with her? Who arranged (p. 1150) that conference? Mr. Putman that used to be your attorney; right?

A Yes.

Q Now deceased? He was in partners with Mr. Maglothin?

A Yes, sir.

Q And Ms. White?

A Yes.

Q They arranged it; that's correct?

A Mr. Putman asked me to go down there.

Q Okay. You have no knowledge about the Prosecutor arranging that; do you?

A No, sir.

Q Okay. Do you remember Dr. Betty Back saying that you stated that you and your husband were arguing or upset about moving to a trailer? Do you remember her saying that?

A Yes.

Q. Arguing or upset? Those were her answers that, she attributed them to you; is that correct?

A Yes.

Q All right. And she said, she went further on to say "she", meaning you, felt they needed to discuss this and he seemed to be set on moving to the trailer?

A Yes, sir.

(p. 1151) Q Fair enough statement?

A Yes.

Q "This was something they were upset about this evening and they were quarrelling or arguing", her words; is that correct? Is that a correct quote I'm reading to you?

A That's what she said.

Q And those were the words she attributed to you; is that correct? When you were talking to her back, September the 27th, 1984?

A Yes.

Q Page 42. Do you remember her saying this: "You mentioned something about moving out to a trailer to her and that her husband was set on moving to the trailer and she felt they should discuss it more. She", meaning you, "was upset about this and went to another room to lay down". Is that fairly accurate? Do you remember her saying that?

A I remember her saying that.

Q Is that what you in fact told her?

A I don't remember telling her those exact words; no, sir.

Q You think she was like these other, these police officers, fabricating all of this stuff?

A I have never said anybody fabricated anything.

(p. 1152) Q Okay. Now, I believe that you remember her saying "after the brother left, she", being you, "came out to eat pizza but the husband wouldn't—would not allow her to have any"; is that right?

A Yes, sir.

Q Now, would you agree with me that if that's what you told her in that interview on September the 27th, that's the first time we got anybody saying you said something about some pizza; isn't that correct?

A I guess so.

Q Okay. Then you say "the Defendant", being you, "told her, her husband she was going out and get pizza but he would not allow her to leave the house"; is that right?

A I don't remember telling her that I was going out to get pizza.

Q You don't remember that? Would it help you to look at Page 43, help you refresh your memory a little bit? Right here, "after the brother left she came out because she wanted to eat some of the pizza and her husband wouldn't allow her to have any pizza. She said then she would go out and get pizza and he wouldn't allow her to leave the house"?

(p. 1153) A Well, I still don't remember telling her that.

Q You're not denying that's what Betty Back said; are you?

A No, sir. I'm just saying I don't remember telling her I was going out to get pizza.

Q All right. But you're not denying that's what Betty Back says you told her?

A No, sir, I wouldn't deny that's what she said.

Q Okay. It goes on, "he, he wouldn't allow her to leave the house"? You told her that, didn't you, that he wouldn't allow you to leave the house?

A I told her he wouldn't let me leave.

Q Okay. Now, let's get down to a couple of details. Did you tell her "the husband pushed her against the

wall, but she did not describe how he pushed her and she did not act it out"? Is that an accurate reflection of what she said?

A Yes, sir.

Q Huh?

A Yes, sir.

Q Also, "did not say what portion of her body he pushed"? Is that accurate?

A Yes.

Q "Defendant said she picked up the gun because she didn't want him hitting her, shoving her any more"? (p. 1154) accurate?

A That's what I told her.

Q "Husband would not let her out the door, he slammed the door and the gun went off and he fell and he died"? Is that accurate?

A Yes, sir.

Q You testified to, oh, a few details, haven't you? If your testimony is accurate, you gave here a few details; is that right?

A Yes.

Q Okay. Do you remember me asking her if you had ever told her that after that first push he ever touched you again? Remember me asking her that?

A Not specifically, but I remember.

Q Do you remember her answer as to what you told her? Page 47. "If the Defendant had told me he had

hit her again, I would have written it down"? Remember that?

A Yes, sir.

Q Remember her making that statement, "she did not tell me that her husband struck the gun or struck her when he slammed the door"? Remember her stating that?

A Yes.

Q Do you remember her saying "Did she say anything (p. 1155) about where she was standing when he slammed the door"?

A Yes, sir, I remember saying that.

Q Page 48. "The Defendant did not mention any physical contact between her and her husband after he pushed her one time". Remember her saying that?

A Yes, sir, I remember her saying that.

Q And Page 52, "she did not tell me what she did with the gun afterward"? Remember that?

A Yes, sir, I remember her saying that.

Mr. Clinger: One moment, please, Your Honor.

By Mr. Clinger:

Q Do you remember telling Dr. Betty Back that you were drinking that night but in your opinion you were not intoxicated?

A Yes, sir, I remember saying that.

Mr. Clinger: Pass the witness, Your Honor.

The Court: Redirect?

Mr. Maglothin: Yes, Sir, a little bit.

(p. 1156) REDIRECT EXAMINATION

By Mr. Maglothin:

Q Vickie, since Mr. Clinger brought up about Dr. Betty Back's testimony, do you remember Dr. Betty Back testifying that she had a PhD in both psychology and neuro-psychology?

A Not specifically.

Q Not specifically? All right. Do you remember her testifying about all the experience she had in hypnosis, that she had worked for the—

Mr. Clinger: Your Honor, I'm going to have to object. The Court's already ruled that the hypnosis was improperly done.

The Court: Hypnosis is out of this.

Mr. Maglothin: Judge, he went into it all through, what she testified to. I would ask the Court to let me proceed just a little bit further.

The Court: This Court made a ruling at least three or four times and you-all know what the ruling is. The ruling is we're not (p. 1157) going into hypnotic enhanced testimony or memory, and in aid of that, I do not want to get back into the hypnosis business again and I don't intend we'll do it because it's not relevant, it's not material. Now, if you want to get, if you want to redirect or re-

habilitate or whatever on what this lady's memory of what Dr. Back testified, that's fine.

Mr. Maglothin: That's what I was going to do, Judge.

The Court: But we're not going back into the hypnosis.

Mr. Maglothin: I agree. What I was trying to do, we were talking about Dr. Betty Back and I was trying to identify who she was, Your Honor, but I'll move on down.

The Court: All right.

By Mr. Maglothin:

(p. 1158) Q Do you recall Betty Back testifying right in that witness stand right there to Mr. Clinger's questions, answer, "she said there was an end table in the corner and that the gun was on it and she explained at that time that the reason there was a gun on the table, she and her husband was working at nights as a watchman, so to speak, for the business that was behind the residence, she said', referring to you, Vickie, "that she picked up the gun because she didn't want him hitting her, shoving her any more, he would not let her out the door, he slammed the door, and then I", referring to Dr. Betty Back, has this in quotes, "the gun went off and he fell and he died". That's Page 46, Line 7 through 20. Do you recall her testifying to that?

A Yes.

Q And that's what you told her; wasn't it, ma'am?

A Yes, sir, I told her that, I told her what happened.

Q All right. Now, Mr. Clinger brought up one point about this interview that you had with Dr. Back. This was prior to you being hypnotized?

A Yes.

Q Now then, do you, after being hypnotized—

Mr. Clinger: Your Honor, objection.

(p. 1159) The Court: Sustained.

By Mr. Maglothin:

Q Page 46, Line 22 and 23, Mr. Clinger asked the question "And the gun went off, then he fell and he died?" Do you recall Dr. Betty Back testifying this way, "And the gun went off and he fell and he died"? Do you recall telling her that?

A Yes.

Q Page 26, Lines 3 through 11, do you recall Betty Back testifying in this very courtroom here, her answer, "Yes, she said that they got along fairly well, that he had never hit her. He had tried once when he was drunk and that the night of the incident was the first time he had gotten rough with her, you know, shoved her, pushed her around, and that he had been drinking that night and that their problems in her, their marriage, had mostly revolved around a drinking problem he had"? Vickie, did he ever try to beat you before or hit you before?

A He tried once, but it wasn't much of anything.

Q In other words, did he miss you?

A Yes.

Q Vickie, Mr. Clinger asked you a number of questions (p. 1160) concerning statements made to police officers when you were—do you recall what time you were brought down to the police station?

A No, sir. They took me down to the police station after they got there. I don't know what time it was.

Q Okay. Do you recall how long you were down there before someone talked to you?

A It wasn't very long, I know it wasn't very long, but I don't know how long it was.

Q Could it have all happened within thirty minutes?

A I couldn't say. I don't know.

Q All right. Now, he asked you about Officer Roles and what his statements said and whether you remembered making that statement. Do you recall Officer—what's that handsome fellow's name—Strickland, Strickland, Officer Strickland testifying that he interviewed you with Officer Roles?

A I remember him saying he had; yes, sir.

Q Okay. And his report has been introduced into evidence?

A Yes.

Q Do you recall in that report that you told them that it was an accident?

A I remember—what it says in the report, I don't (p. 1161) know.

Q Okay.

A I do know I told him it was an accident.